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3
4 UNITED STATES DISTRICT COURT
5 WESTERN DISTRICT OF WASHINGTON
6 AT TACOMA

7 KURTIS MONSCHKE,

8 Petitioner,

9 v.

10 JAMES N. CROSS and BERNIE
11 WARNER,

12 Respondents.

No. 11-5276 RBL/KLS

REPORT AND RECOMMENDATION
Noted for: June 29, 2012

13 Petitioner Kurtis Monschke filed a petition for writ of habeas corpus under 28 U.S.C. §
14 2254 challenging his 2004 conviction for aggravated first degree murder and raising nine
15 grounds for federal habeas relief. ECF No. 1. Respondents filed an Answer and submitted
16 relevant portions of the state court record. ECF Nos. 25 and 26. Having carefully considered the
17 parties' filings and relevant record, the undersigned recommends that the petition be denied and
18 this action dismissed with prejudice.

19 **BACKGROUND**

20 Mr. Monschke was convicted by jury verdict of one count of aggravated first degree
21 murder. On June 4, 2004, Pierce County Superior Court Judge Lisa R. Worswick sentenced him
22 to life imprisonment without the possibility of parole. ECF No. 46, Exh. 18. Mr. Monschke is
23 currently incarcerated by the United States Bureau of Prisons pursuant to an agreement between
24 the state Department of Corrections (DOC) and the federal government.
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1 **A. Factual Background**

2 **1. Facts of Crime**

3 The Washington Court of Appeals summarized the facts of Mr. Monschke's crime as
4 follows:

5 Early on the morning of March 23, 2003, Terry Hawkins and Cindy
6 Pitman observed a group of "[s]kinheads" kicking and using baseball bats to hit
7 what appeared to be the Tacoma railroad track. 22 Report of Proceedings (RP) at
8 1078. The individuals were hollering and appeared drunk. Hawkins and Pitman
9 were homeless and lived in a camp under Interstate 705 near the train tracks and
10 the Tacoma Dome. Hawkins told police that he saw three men and a woman
11 kicking dirt and hitting at the ground; at trial, he testified that he saw two men
12 swinging bats, a woman kicking, and a third man standing four feet away. Pitman
13 told police and later testified that she saw three men with shaved heads swinging
14 and kicking but did not see a woman.

15 Hawkins and Pitman watched for approximately 10 minutes before turning
16 around and walking away. They headed up a trail but when the commotion
17 stopped, they decided to go back toward the train tracks and their camp. On their
18 way to the camp site, Hawkins and Pitman passed the people involved in the
19 commotion: a man and woman snuggled together with two men following behind.
20 The four headed up the trail and appeared "scared," like "[t]hey were trying to get
21 away from there." 23 RP at 1218.

22 As Hawkins and Pitman approached the tracks where the commotion had
23 been, they heard a strange gurgling sound. They discovered the badly beaten and
24 bloody body of Randy Townsend, lying on his back with his head slumped over
25 the train track. Hawkins and Pitman knew Townsend as a white acquaintance
26 who camped nearby, but Townsend was so disfigured that neither Hawkins nor
Pitman immediately recognized him. Hawkins and Pitman ran to get aid and call
the police. As they returned to Townsend, Hawkins and Pitman saw the four
individuals involved in Townsend's assault driving away in a "blue Datsan [sic]
beater." 27 RP at 1769.

28 Townsend never regained consciousness and died after 20 days on life
29 support. The medical examiner determined the cause of death as blunt force
30 trauma to the head, with at least 19 points of impact. Townsend's facial bones
31 were broken and his face had separated from his skull. One of the blows caused a
32 large subdural hematoma on the back side of his skull. This wound was
33 consistent with his head having been forcefully stomped on while he was lying
34 face down on the train track.

1 During the investigation that followed, officers found hate-based graffiti
2 near the murder scene. The graffiti included swastikas, lightning bolts in the
3 shape of “SS,” “White Power Skinheads,” “U Suck Wiggers,” “El Spic,”
4 “Skinhead white to the bone,” “Die SHARPS,” “Die Junky Die,” “El Nigger,”
5 “Tacoma Skinhead Movement,” “die niggers,” “Heil Hitler,” and “Fuck All Drug
Addicts.”² 21 RP at 940; 26 RP at 112, 116, 118–19, 121–22. Homeless people
in the area told police that the graffiti began appearing a couple weeks before
Townsend’s murder.

6 Officers also talked to Mertis Mathes and Amy Gingrich, a homeless
7 couple living in a camp two blocks from the murder scene. Mathes is black and
8 Gingrich is white. Mathes and Gingrich told officers they woke early on the night
9 of the murder when three loud men approached their camp. Gingrich recognized
10 one of the men from a casual encounter a couple weeks earlier. The men had
shaved heads, appeared drunk, and were carrying baseball bats. Mathes asked
what the men wanted. One responded, “we plan on doing a nigger like you.” 21
RP at 956. When Mathes grabbed his machete, the three men walked away.

11 Officers linked the crime scene graffiti to a reported incident of graffiti at
12 an apartment building two blocks from the murder scene. Scotty Butters, Tristain
13 Frye, and David Pillatos had been evicted from the Rich Haven Apartments for
14 yelling racial slurs at passersby, painting swastikas and “Fuck all niggers” on the
15 building, and for Butters’s sale of imitation cocaine to a drug addict. 26 RP at
147. Butters, Frye, and Pillatos matched Hawkins and Pitman’s descriptions of
Townsend’s assailants.

16 Frye and Pillatos lived with Monschke. Frye and Pillatos were in a
17 relationship and Frye was three months’ pregnant. A car matching the one
18 Hawkins and Pitman described was parked outside Monschke’s apartment.
19 Officers went to the apartment to discuss an unrelated incident with Pillatos, and
20 he invited them inside. In Monschke’s apartment, officers saw Nazi and white
supremacist paraphernalia. They also noticed cigarette packages and empty beer
bottles of the same brand found at the crime scene. Pillatos freely told the officers
that he and Monschke were white supremacists.

21 ² A pair of lightning bolts in the shape of “SS” is a neo-Nazi symbol. “Wigger” is
22 a disparaging term used to describe white individuals who associate with
23 minorities. “SHARPS” is an acronym for the white supremacist group Skinheads
Against Racial Prejudice. “Spic” is a disparaging term used to describe a person
of Latin American descent. [Court’s footnote 2.]

24 ECF No. 25, Exh. 23, at 1-4; *State v. Monschke*, 133 Wn. App. 313, 319-21, 135 P.3d 966
25 (2006).

2. Trial Testimony

The Washington Court of Appeals summarized the testimony presented at trial:

Frye testified at trial that on the evening of March 22, 2003, Pillatos brought up the subject of taking Frye out to earn her “red [shoe]laces.” 30 RP at 2330. According to Frye, red shoelaces symbolized that the wearer had assaulted a member of a minority group; Butters, Monschke, and Pillatos each wore red shoelaces. Pillatos encouraged Butters and Monschke to take Frye out; the three men had discussed the idea two or three times before. After the discussion, the four drove to a grocery store to buy beer. The three men also purchased two baseball bats. They did not discuss the reason for the bats, but, according to Frye, it was understood that “they weren’t going to be used for baseball.” 31 RP at 2485.

The four then drove to the Tacoma Dome. Butters expressed a desire to go to a different part of the city to “beat up some niggers,” but Frye and Pillatos wanted to show Monschke graffiti they had recently painted nearby. 30 RP at 2333. As they walked underneath Interstate 705, Frye separated from the group. She sat down and Townsend approached her. Townsend asked for a cigarette and a beer and the two talked for awhile.

Townsend finished his cigarette and had begun to walk away when Butters and Pillatos confronted him. Butters said something to Townsend and then struck him in the head with the bat. The blow shattered the bat and sent Townsend to the ground. Butters and Pillatos then began kicking Townsend in the head. Pillatos picked up a large rock, later determined to weigh 38 pounds, and threw it on Townsend’s face. Butters and Pillatos carried Townsend to the train tracks and placed him on his stomach with his head lying face down on the track. Butters then stomped on the back of Townsend’s head. Although Townsend was still breathing, Butters exclaimed, “I killed that guy.” 30 RP at 2346. Butters and Pillatos went to find Monschke.

Monschke was carrying the second bat when the three men returned to where Townsend lay. Monschke walked up to Townsend and began hitting him in the head with the bat. Monschke struck 10 to 15 blows while Butters continued to kick Townsend’s head. Butters repeatedly called Townsend “a piece of shit.” 30 RP at 2349. Pillatos told Frye to kick Townsend. According to Frye, she initially refused, but Pillatos covered her eyes and led her to Townsend. Frye then kicked Townsend’s head four times. As the group left, Monschke stated, “I wonder if God gives us little brownie points for this.” 31 RP at 2369.

When the four returned to Monschke’s apartment, Monschke and Pillatos gathered up the clothing worn during the attack and left to burn it. Later, Butters told Frye, “Don’t feel sorry for that piece of shit. He wasn’t white.” 31 RP at

2374. Butters excitedly told Frye that she had earned her red laces and he had earned his “bolts.” 31 RP at 2375. At trial, the State presented evidence that between the time of his arrest and his testimony at trial, Butters had obtained an “SS” lightning bolt tattoo. *See* note 1, *supra*.

Butters, Pillatos, and Monschke also testified; their testimony differed from each other’s and from Frye’s in certain respects. Pillatos testified that Monschke hit Townsend in the head with the bat three or four times. Monschke and Butters testified that Monschke was somewhere else during the entire assault and that he used the bat afterwards simply to nudge Townsend to see if he was still alive. Butters also testified that he told officers that Monschke hit Townsend 10 or more times.

Although all three men denied that Townsend’s death was premeditated or that it had anything to do with earning red shoelaces, Butters and Pillatos offered contradictory testimony. Like Frye, Butters testified that on the night of the murder, there was a discussion about Frye earning her red shoelaces. According to Butters, red shoelaces reflected that one was willing to shed blood, not necessarily that one had done so; Butters had earned his red shoelaces on more than one occasion by doing something physical. Butters testified that after the attack, Frye said, “This means my baby gets to wear red laces, too.” 30 RP at 2293. In addition, Pillatos testified that Townsend “got beat up” because he was a drug addict and a “parasite.” 29 RP at 2106.

Jennifer Stiffler, who dated Monschke from September 2002 to March 2003, testified that Monschke was a very active white supremacist: He was a member of Volksfront and often talked about moving up in the group and starting a Tacoma chapter; he took Stiffler to a meeting for National Alliance; he decorated his home with white supremacist and Nazi memorabilia, including a flag for National Alliance; he listened to racist music; he frequently passed out fliers from several groups; and he obtained Nazi and white supremacist tattoos. According to Stiffler, Monschke and Pillatos repeatedly watched the movie *AMERICAN HISTORY X* (New Line Productions 1998), which includes a “curb stomp” scene that Monschke particularly enjoyed. In that scene, the main character, a white supremacist, shoots a black man and then stomps on the back of his head while the man is forced to bite a street curb.

Stiffler further testified that Monschke would wear white or red suspenders and red shoelaces whenever he went out with friends. Monschke told Stiffler that white suspenders symbolized “white pride” and that red shoelaces and suspenders “means you’ve beaten up somebody.” 32 RP at 2602. Stiffler testified that she overheard Monschke several times talking to Frye about earning her red shoelaces. Stiffler also testified that Monschke had told her that he hated drug addicts.

1 The State presented evidence of white supremacist paraphernalia police
2 found during their investigation. The items found in Monschke's apartment
3 included: a National Alliance flier; pamphlets entitled "Martin Luther King Jr.
4 was a fraud," "What is Holocaust Denial," and "Inside the Auschwitz Gas
5 Chambers";³ and a business card listing a website and reading "Sick of wiggers?
6 So are we. Check us out."⁴ The items found in a storage unit Pillatos rented
7 included: applications filled out by Pillatos and Frye to join the Aryan Nations;
8 photos showing that Monschke had tattoos identical to the main character in
9 AMERICAN HISTORY X; and a photo of Monschke giving a Nazi salute.

10 The State also presented evidence of white supremacist paraphernalia
11 found in Brian Zauber's home. At the time of his arrest, Monschke was living
12 with Zauber,⁵ the local leader for National Alliance. Officers saw a hanging flag
13 matching one that had been seen in Monschke's apartment. They also found the
14 following items: THE TURNERS DIARIES [sic],⁶ a book commonly referred to
15 as "the bible for the white supremacist movement";⁷ a National Alliance
16 membership card and an order form for National Alliance books and pamphlets; a
17 "White Aryan Resistance" newspaper;⁸ and an envelope with the names "Randall
18 Townsend" and "Kurtis Monschke" written on it.⁹

19 Officers found the following in a bag belonging to Monschke: a National
20 Alliance handbook and membership list; a photo album of white supremacist
21 activities; and a flag with "SS" shaped lightning bolts. *See* note 1 [sic], *supra*.
22 The State and Monschke each presented expert testimony on the subject of white
23 supremacy. The State called Mark Pitcavage, the director of fact-finding for the
24 Anti-Defamation League (ADL). Pitcavage had studied white supremacy for
25 several years and supervised the ADL's monitoring and research of extremist
26 groups. Pitcavage testified that white supremacists could be identified by a
shared ideology summed up in the following mission statement known as "The 14
Words": "We must secure the existence of our race and a future for white
children." 25 RP at 1598. Pitcavage opined that this ideology fostered so many
shared similarities, beliefs, and customs that white supremacists could be
considered a "group" within the common meaning of the term.

Pitcavage considered white supremacists to be a "group" even though they
were not well organized, did not have one overarching structure, had many
subgroups, and were split over the advocacy and use of violence. Pitcavage
explained that the subgroups were nonexclusive; routinely overlapping; and often
loosely organized to prevent police infiltration, to limit legal liability, and to
maintain a certain level of personal anonymity. Pitcavage testified to an
organized "hierarchal structure" "in terms of status, where someone who's
perceived to be really standing up for the white race, really being a white warrior,
gets more results of status, gets more respect." 25 RP at 1635. In addition,
Pitcavage testified that many subgroups internally advocated violence but

publicly professed nonviolence so as to avoid lawsuits of the sort that had disbanded earlier white supremacy groups.

Monschke called Randy Blazak, a college professor whose research focused on hate crimes. Blazak opined that white supremacists were not an “identifiable group.” Blazak agreed with Pitcavage that white supremacists shared an ideology captured by “The 14 Words,” but he testified that in his opinion there was too much conflict within the movement to consider white supremacists a cohesive group. These conflicts included disagreement over the need of an organized hierarchy, the use of violence, the role of religion, and defining who was “white.”

Blazak also testified about Volksfront and National Alliance. According to Blazak, National Alliance was a highly violent subgroup of white supremacists. Blazak testified that a member could gain status in National Alliance for murdering someone deemed inferior. Blazak described Volksfront as a very secretive organization with a “public front” of nonviolence, but he noted that “there may be other things that go on behind closed doors.” 34 RP at 2911. Blazak also testified that Volksfront had an organizational hierarchy. According to Blazak, Volksfront and National Alliance had over the last several years been partnering and connecting.

The State presented evidence that Volksfront maintained a prisoners-of-war (POW) list on its website. The list included the contact information for members of the white supremacy movement that had committed hate crimes and were currently incarcerated. Several individuals on the list had committed “very violent” crimes. 33 RP at 2696. The State also presented evidence that Monschke left messages on Volksfront’s website and that he went by the screen name “SHARPshooter.” 33 RP at 2686. See note 1 [sic], supra.

³ 27 RP at 1789. [Court’s footnote.]

⁴ 27 RP at 1793-94; see note 1, supra. [Court’s footnote.]

⁵ Monschke was evicted from his apartment in the period between the attack and his arrest. [Court’s footnote.]

⁶ ANDREW MACDONALD, *THE TURNERS DIARIES* [sic] (2d ed.1996). [Court’s footnote.]

⁷ 28 RP at 1920. [Court’s footnote.]

⁸ 28 RP at 1923. [Court’s footnote.]

⁹ 28 RP at 1922. [Court’s footnote.]

ECF No. 25, Exh. 23, at 6-11, *State v. Monschke*, 133 Wn.App. at 323-38.

1 **B. State Procedural History**

2 **1. Direct Appeal**

3 The jury convicted Mr. Monschke of aggravated first degree murder and he appealed to
4 the Washington Court of Appeals. Appellate counsel filed a brief raising numerous claims,
5 including challenges to the constitutionality of RCW 10.95.020(6) (which defines first-degree
6 murder as aggravated first-degree murder if the defendant “committed the murder to obtain or
7 maintain his or her membership or to advance his or her position in the hierarchy of an
8 organization, association, or identifiable group”), evidentiary rulings, and the court’s decision to
9 require Mr. Monschke to wear a stun belt throughout the trial. ECF No. 26, Exh. 19. Mr.
10 Monschke filed a pro se statement of additional grounds for review. *Id.*, Exh. 20. On June 6,
11 2006, the Court of Appeals issued an opinion published in part, affirming the conviction. *Id.*,
12 Exh. 23, *State v. Monschke, supra*.

14 Mr. Monschke sought discretionary review by the Washington Supreme Court. ECF No.
15 26, Exh. 24, at 5-20. On March 6, 2007, the Washington Supreme Court denied review without
16 comment. *Id.*, Exh. 25. The Washington Court of Appeals issued its mandate on March 13,
17 2007. *Id.*, Exh. 26. The United States Supreme Court denied Mr. Monschke’s petition for
18 certiorari on October 1, 2007. *Monschke v. Washington*, 552 U.S. 841 (2007).

20 **2. Personal Restraint Petition (2008-2011)**

21 On September 30, 2008, Mr. Monschke filed a pro se personal restraint petition with the
22 Washington Court of Appeals. ECF No. 26, Exh. 27. Counsel was later appointed for him, *see*
23 Exhibit 29, and counsel filed a brief in support of the petition. *Id.*, Exh. 30. The petition
24 presented the Court of Appeals with two claims: (1) defense counsel provided ineffective
25 assistance at trial by calling Dr. Blazak as a defense witness without conducting an adequate
26

1 investigation of what he would say on cross-examination; and (2) the prosecutors committed
2 misconduct by calling witnesses (Pillatos and Frye) who concocted a false story to obtain Frye's
3 early release and by reaching a favorable plea agreement with Frye based on the elected
4 prosecutor's personal friendship with Frye's defense counsel. *Id.*, Exh. 27 (petition), at 15-19;
5 Exh. 30 (counsel's opening brief), at 5-43. Both Mr. Monschke and the State supplemented their
6 submissions to the court with numerous affidavits, declarations, and other documents. *See id.*,
7 Exhs. 27, 28A, and 30.
8

9 The Court of Appeals rejected Mr. Monschke's claims and dismissed the petition in a
10 published opinion. ECF No. 26, Exh. 31; *In re Monschke*, 160 Wn. App. 479, 251 P.3d 884
11 (2010). The Court of Appeals ruled that Mr. Monschke failed to prove counsel's performance
12 with respect to Dr. Blazak's testimony was deficient and there was no prejudice to Mr.
13 Monschke's right to a fair trial. *Id.*, Exh. 31, at 12-16. The court also held the State had a
14 legitimate purpose in reaching a plea agreement with Frye and there was nothing improper in the
15 plea agreement. *Id.* at 16-18. The court further concluded that Mr. Monschke failed to prove
16 any of the testimony was perjured. *Id.* at 18-20.
17

18 Mr. Monschke sought discretionary review by the Washington Supreme Court.
19 Counsel's motion for discretionary review presented the Supreme Court with two grounds for
20 review: (1) counsel provided ineffective assistance by calling Dr. Blazak as a defense witness
21 without conducting an adequate investigation of what he would say on cross-examination; and
22 (2) the prosecutors committed misconduct by calling Pillatos and Frye as State's witnesses, and
23 by offering Frye a favorable plea agreement, despite the witnesses' efforts to present perjured
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25
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1 testimony. ECF No. 26, Exh. 34.¹ The motion was not filed, however, until April 6, 2011. The
2 clerk directed counsel to file a motion for extension of time to file a motion for discretionary
3 review. *Id.*, Exh. 36. Counsel filed the motion and the court granted it. *Id.*, Exh. 37.

4 On July 11, 2011, the Commissioner of the Supreme Court denied discretionary review.
5 ECF No. 26, Exh. 39. The Commissioner concluded that defense counsel's performance was not
6 deficient and that Mr. Monschke had failed to establish prejudice. *Id.* at 2. The Commissioner
7 agreed with the Court of Appeals that the State did not knowingly present perjured testimony and
8 that Mr. Monschke failed to prove that Frye perjured herself. *Id.* at 3. Mr. Monschke's motion to
9 modify the Commissioner's ruling was denied. *Id.*, Exhs. 40, 41.

11 **ISSUES FOR FEDERAL REVIEW**

12 Mr. Monschke raises nine grounds for federal habeas relief, summarized as follows:

- 13 1. The statutory aggravating factor under RCW 10.95.020(6) that the
14 defendant "committed the murder to obtain or maintain his or her
15 membership in the hierarchy of an organization, association, or
16 identifiable group" is vague and overbroad, in violation of the First and
17 Fourteenth Amendments.
- 18 2. The statutory aggravating factor under RCW 10.95.020(6), as interpreted
19 by the Washington courts, unconstitutionally punishes defendants for
20 engaging in First Amendment-protected activity.
- 21 3. The trial court's limiting instruction concerning the jury's consideration of
22 the white supremacist literature and materials seized at Monschke's
23 residence allowed the jury to consider First Amendment-protected conduct
24 as evidence of guilt.
- 25 4. Petitioner was denied the Sixth Amendment right to confront and cross-
26 examine David Pillatos, Dr. Mark Pitcavage, and Detective Shipp.

¹ The State also filed a motion for discretionary review. The State's motion challenged the Court of Appeals' holding that personal restraint petitioners who raise ineffective assistance of counsel claims need not satisfy a heightened standard of showing "actual prejudice" in order to obtain relief on collateral review. *See* ECF No. 26, Exh. 35. The Commissioner of the Washington Supreme Court denied the State's motion in a separate order issued on September 30, 2011. *Id.*, Exh. 42.

- 1 5. Petitioner was denied the Sixth Amendment right to compulsory process
2 by the exclusion of expert testimony of Randy Blazak regarding the
3 phenomenon of white gangs in juvenile detention facilities.
- 4 6. The prosecutor committed misconduct by falsely impugning the integrity
5 of defense counsel and suggesting defense counsel had tampered with a
6 State's witness, in violation of the Sixth Amendment.
- 7 7. The trial court's "to-convict" instruction (Instruction No. 12) relieved the
8 State of its burden of proving each element of the crime beyond a
9 reasonable doubt.
- 10 8. Defense counsel provided ineffective assistance by failing to properly
11 investigate and prepare Dr. Randy Blazak, a defense expert whose
12 testimony was damaging to the defense theory.
- 13 9. The prosecutor committed misconduct by presenting false testimony and
14 by offering a co-defendant a favorable plea bargain based on the personal
15 friendship between the elected prosecutor and the co-defendant's attorney.

16 ECF No. 1, at 5-8; 24-40.

17 **EXHAUSTION OF STATE REMEDIES**

18 Respondent concedes that Mr. Monschke has exhausted his available state remedies. *See*
19 ECF No. 25, at 11.

20 **EVIDENTIARY HEARING**

21 A petitioner who fails to develop the factual basis of a claim in state court is not entitled
22 to an evidentiary hearing unless the claim relies on:

23 (i) a new rule of constitutional law, made retroactive to cases on collateral review
24 by the Supreme Court, that was previously unavailable; or

25 (ii) a factual predicate that could not have been previously discovered through the
26 exercise of due diligence; and

 (B) the facts underlying the claim would be sufficient to establish by clear and
convincing evidence that but for constitutional error, no reasonable factfinder
would have found the applicant guilty of the underlying offense. . . .

1 28 U.S.C. § 2254(e)(2).

2 “[T]he statute applies only to prisoners who have ‘failed to develop the factual basis of a
3 claim in State court proceedings.’” *Williams v. Taylor*, 529 U.S. 420, 120 S.Ct. 1479, 1487.

4 “[A] failure to develop the factual basis of a claim is not established unless there is a lack of
5 diligence, or some greater fault, attributable to the prisoner or the prisoner’s counsel.” *Id.* at
6 1488. “Diligence for purposes of the opening clause depends upon whether the prisoner made a
7 reasonable attempt, in light of the information available at the time, to investigate and pursue
8 claims in state court; it does not depend ... upon whether those efforts could have been
9 successful.” *Id.* at 435; *Baja v. Ducharme*, 187 F.3d 1075, 1078-79 (9th Cir. 1999).

11 Even if 28 U.S.C. § 2254(e)(2) does not bar an evidentiary hearing, the decision to hold a
12 hearing is still committed to the Court’s discretion. *Schriro v. Landrigan*, 550 U.S. 465, 127 S.
13 Ct. 1933, 1939-41 (2007). A hearing is not required if the allegations would not entitle petitioner
14 to relief under 28 U.S.C. § 2254(d). *Id.* at 1939-40. “In deciding whether to grant an evidentiary
15 hearing, a federal court must consider whether such a hearing could enable an applicant to prove
16 the petition’s factual allegations, which, if true, would entitle the applicant to federal habeas
17 relief.” *Landrigan*, 127 S. Ct. at 1940. “Because the deferential standards prescribed by § 2254
18 control whether to grant habeas relief, a federal court must take into account those standards in
19 deciding whether an evidentiary hearing is appropriate.” *Id.* “It follows that if the record refutes
20 the applicant’s factual allegations or otherwise precludes habeas relief, a district court is not
21 required to hold an evidentiary hearing.” *Id.* In determining whether relief is available under 28
22 U.S.C. § 2254(d)(1), the Court’s review is limited to the record before the state court. *Cullen v.*
23 *Pinholster*, ---U.S.---, 131 S. Ct. 1388 (2011). The statute bars consideration of evidence
24 presented for the first time in federal court. *Id.*

1 Mr. Monschke's habeas claims present legal questions only and therefore, they may be
2 resolved by review of the state court record. Moreover, his claims were adjudicated on the
3 merits by the state courts for purposes of 28 U.S.C. § 2254(d). The state court decisions in Mr.
4 Monschke's case contain findings of fact that are entitled to deference under 28 U.S.C. §
5 2254(d)(2) and the presumption of correctness under 28 U.S.C. § 2254(e)(1). Habeas review in
6 this case is limited to the record that was before the state courts. *Cullen v. Pinholster, supra*.
7 The undersigned concludes that this Court need not conduct an evidentiary hearing.
8

9 STANDARD OF REVIEW

10 Federal courts may intervene in the state judicial process only to correct wrongs of a
11 constitutional dimension. *Engle v. Isaac*, 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982).
12 Federal habeas corpus relief does not lie for mere errors of state law. *Estelle v. McGuire*, 502
13 U.S. 62, 112 S. Ct. 475 (1991); *Lewis v. Jeffers*, 497 U.S. 764, 110 S. Ct. 3092 (1990); *Pulley v.*
14 *Harris*, 465 U.S. 37, 41, 104 S. Ct. 871 (1984).
15

16 A federal court cannot grant a writ of habeas corpus to a state prisoner with respect to any
17 claim adjudicated on the merits in state court unless the state court's adjudication of the claim (1)
18 resulted in a decision that was contrary to, or involved an unreasonable application of, clearly
19 established Federal law, as determined by the Supreme Court of the United States; or (2) resulted
20 in a decision that was based on an unreasonable determination of the facts in light of the
21 evidence presented in the State court proceeding. 28 U.S.C. § 2254(d). State court decisions
22 must be given the benefit of the doubt. *Woodford v. Visciotti*, 537 U.S. 19, 24, 123 S.Ct. 357
23 (2002).
24

25 A state court decision is "contrary to" the Supreme Court's "clearly established precedent
26 if the state court applies a rule that contradicts the governing law set forth" in the Supreme

1 Court's cases or if the state court confronts a set of facts that are materially indistinguishable
2 from a decision of the Supreme Court and "nevertheless arrives at a result different from that
3 precedent." *Lockyer v. Andrade*, 538 U.S. 63, 73, 123 S.Ct. 1166 (2003) (quoting *Williams v.*
4 *Taylor*, 529 U.S. 362, 405-06, 120 S.Ct. 1495 (2000)). "The 'unreasonable application' clause
5 requires the state court decision to be more than incorrect or erroneous." *Lockyer*, 538 U.S. at
6 75. That is, "[t]he state court's application of clearly established law must be objectively
7 unreasonable." *Id.*

8
9 Under 28 U.S.C. § 2254(d)(2), a federal petition for writ of *habeas corpus* also may be
10 granted "if a material factual finding of the state court reflects 'an unreasonable determination of
11 the facts in light of the evidence presented in the State court proceeding.'" *Juan H. v. Allen*, 408
12 F.3d 1262, 1270 n.8 (9th Cir. 2005) (quoting 28 U.S.C. § 2254(d)(2)). However, "[a]
13 determination of a factual issue made by a State court shall be presumed to be correct," and the
14 petitioner has "the burden of rebutting the presumption of correctness by clear and convincing
15 evidence." 28 U.S.C. § 2254(e)(1).
16

17 DISCUSSION

18 A. Claim 1 – Constitutionality of RCW 10.95.020(6)

19 In his first ground for federal habeas relief, Mr. Monschke argues that RCW
20 10.94.020(6) is unconstitutionally vague and overbroad in violation of the First and Fourteenth
21 Amendments to the Constitution. ECF No. 1, at 5; ECF No. 30, at 10-15. RCW 10.95.020(6)
22 provides that a first-degree murder is an aggravated first-degree murder if the defendant
23 "committed the murder to obtain or maintain his or her membership or to advance his or her
24 position in the hierarchy of an organization, association, or identifiable group." RCW
25 10.95.020(6).
26

1 **1) Overbreadth of RCW 10.95.020(6)**

2 The First Amendment provides that “Congress shall make no law ... abridging the
3 freedom of speech.” The First Amendment protects an individual’s right to express unpopular
4 views and to associate with others who share the same viewpoint. *Texas v. Johnson*, 491 U.S.
5 397, 414 (1989). “[A]s a general matter, the First Amendment means that government has no
6 power to restrict expression because of its message, its ideas, its subject matter, or its content.”
7 *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 573 (2002).
8

9 Under the First Amendment’s overbreadth doctrine, a statute may be invalidated as
10 overbroad for its chilling effect on free speech only if a “substantial” number of its applications
11 would result in prohibiting constitutionally protected speech. *United States v. Williams*, 553
12 U.S. 285, 292, 128 S.Ct. 1830 (2008); *Washington State Grange v. Washington State*
13 *Republican Party*, 552 U.S. 442, 449 n. 6, 128 S.Ct. 1184 (2008). “[W]e have vigorously
14 enforced the requirement that a statute’s overbreadth be *substantial*, not only in the absolute
15 sense, but also relative to the statute’s plainly legitimate sweep. ... Invalidation for overbreadth
16 is ‘strong medicine’ that is not to be ‘casually employed.’” *Williams*, 553 U.S. at 292-93
17 (emphasis in original) (citations omitted). The first step in a court’s overbreadth analysis is “to
18 construe the challenged statute; it is impossible to determine whether a statute reaches too far
19 without first knowing what the statute covers.” *Williams*, 553 U.S. at 293. A state court’s
20 construction of a state statute, including the state court’s definition of statutory terms or any
21 narrowing interpretation it has given the statute, is binding on a federal court. *Wisconsin v.*
22 *Mitchell*, 508 U.S. 476, 483, 113 S.Ct. 2194 (1993); *R.A.V. v. St. Paul*, 505 U.S. 377, 381, 112
23 S.Ct. 2538 (1992).
24
25
26

1 In *Wisconsin v. Mitchell*, the defendant was convicted of aggravated battery and
2 received an enhanced sentence under Wisconsin law based on evidence he intentionally
3 selected his victim on account of the victim's race. *Mitchell*, 508 U.S. at 480-81. The
4 defendant challenged the penalty-enhancement statute on overbreadth grounds, arguing it had a
5 "chilling effect" on his free speech because evidence of his prior speech or associations could
6 be used to prove he had a racial motive to commit the crime. *Id.* at 488. The Supreme Court
7 unanimously rejected this overbreadth claim:
8

9 The sort of chill envisioned here is far more attenuated and unlikely than
10 that contemplated in traditional "overbreadth" cases. We must conjure up a vision
11 of a Wisconsin citizen suppressing his unpopular bigoted opinions for fear that if
12 he later commits an offense covered by the statute, these opinions will be offered
13 at trial to establish that he selected his victim on account of the victim's protected
14 status, thus qualifying him for penalty enhancement We are left, then, with
the prospect of a citizen suppressing his bigoted beliefs for fear that evidence of
such beliefs will be introduced against him at trial if he commits a more serious
offense against person or property. This is simply too speculative a hypothesis to
support *Mitchell's* overbreadth claim.

15 The First Amendment, moreover, does not prohibit the evidentiary use of
16 speech to establish the elements of a crime or to prove motive or intent. Evidence
17 of a defendant's previous declarations or statements is commonly admitted in
18 criminal trials subject to evidentiary rules dealing with relevancy, reliability, and
the like.

19 *Mitchell*, 508 U.S. at 488-89.

20 The Washington Court of Appeals turned to the above cited language in *Johnson*, 491
21 U.S. at 414, and *Mitchell*, 508 U.S. at 488-89, when it rejected Mr. Monschke's claim that he
22 was convicted and punished for expressing unpopular, racist opinions and associating with
23 others who held similar opinions:

24 RCW 10.95.020(6) is far less "intrusive" than the statute upheld in
25 *Mitchell*. It is content neutral and does not intrude on constitutionally protected
26 rights. RCW 10.95.020(6) merely requires an enhanced punishment for
committing murder if the murder was committed to obtain, maintain, or advance

one's position in the hierarchy of an organization, association, or identifiable group. That a political or other viewpoint was expressed through the particular murder or that the murder furthered the exercise of the murderer's association rights does not alter or shield the criminal act: "The First Amendment does not protect violence." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916, 102 S. Ct. 3409, 73 L.Ed.2d 1215 (1982). "[V]iolence or other types of potentially expressive activities that produce special harms distinct from their communicative impact ... are entitled to no constitutional protection." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 628, 104 S. Ct. 3244, 82 L.Ed.2d 462 (1984). Accordingly, we reject Monschke's claim that RCW 10.95.020(6) is unconstitutionally overbroad in that it limits his First Amendment rights.

ECF No. 26, Exh. 23, at 15.

Mr. Monschke was not convicted for espousing unpopular beliefs or for his association with racist organizations. He was convicted under RCW 9A.32.030(1)(a) for committing the premeditated murder of Randall Townsend. As explained by the Washington Court of Appeals, RCW 10.95.020(6) is a sentence enhancement applied in cases in which the defendant committed a premeditated murder in order "to maintain his or her membership or to advance his or her position in the hierarchy or an organization, association, or identifiable group." The enhancement does not increase the defendant's punishment for mere speech or membership in a group. Conversely, the fact that a political or other viewpoint was expressed through the particular murder or that the murder furthered the murderer's association rights does not alter or shield the criminal act. Moreover, the statute is content neutral. It applies regardless of the philosophy or goals of any particular organization, association, or identifiable group.

The Washington Court of Appeals also concluded that there is nothing in RCW 10.95.020(6) to chill the First Amendment right of individuals for espousing white supremacist views or for associating with white supremacist groups. This Court agrees that it is simply too much of a stretch to believe that a person will forgo joining a group out of concern that if he

1 later commits a premeditated murder, his membership in that group will be offered as evidence
2 under RCW 10.95.020(6).

3 The Washington Court of Appeals' rejection of Mr. Monschke's overbreadth argument
4 is neither contrary to, nor an unreasonable application of, clearly established Supreme Court
5 precedent governing such claims. Thus, Mr. Monschke's claim that RCW 10.95.020(6) is
6 unconstitutionally overbroad should be denied.

8 **2. Unconstitutional Vagueness of RCW 10.95.020(6)**

9 A fundamental principle underlying due process is that a criminal statute must give a
10 person of ordinary intelligence fair warning that his contemplated conduct is forbidden; "no
11 man shall be held criminally responsible for conduct which he could not reasonably understand
12 to be proscribed." *Bouie v. City of Columbia*, 378 U.S. 347, 351, 84 S.Ct. 1697 (1964)
13 (quoting *United States v. Harriss*, 347 U.S. 612, 617, 74 S.Ct. 808 (1954)). A criminal statute
14 must clearly define the conduct it proscribes. *Grayned v. City of Rockford*, 408 U.S. 104, 108,
15 92 S.Ct. 2294 (1972). The void-for-vagueness doctrine governing due process challenges
16 requires that a penal statute provide fair warning by defining the criminal offense (1) with
17 sufficient definiteness that ordinary people can understand what is prohibited, and (2) in a
18 manner that does not encourage arbitrary and discriminatory enforcement. *Kolender v.*
19 *Lawson*, 461 U.S. 352, 357, 103 S.Ct. 1855 (1983). A conviction will fail this void-for-
20 vagueness test if the underlying criminal statute does not provide fair notice of what is
21 prohibited, or if it is so standard-less that it authorizes or encourages seriously discriminatory
22 enforcement. *Hill v. Colorado*, 530 U.S. 703, 732, 120 S.Ct. 2480 (2000).

25 "[C]larity at the requisite level may be supplied by judicial gloss on an otherwise
26 uncertain statute," *United States v. Lanier*, 520 U.S. 259, 266, 117 S.Ct. 1219 (1997), but due

1 process places limits on judicial clarification of penal statutes. Although the Ex Post Facto
2 Clause does not directly apply to the judicial branch of government, similar rules against *ex*
3 *post facto* judicial decision-making are inherent in the notion of due process. *Rogers v.*
4 *Tennessee*, 532 U.S. 451, 456, 121 S.Ct. 1693 (2001) (citing U.S. Const. Art. I, § 10, cl. 1).
5 “[A]n unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates
6 precisely like an *ex post facto* law.” *Bouie*, 378 U.S. at 353. Accordingly, “due process bars
7 courts from applying a novel construction of a criminal statute to conduct that neither the
8 statute nor any prior judicial decision has fairly disclosed to be within its scope.” *United States*
9 *v. Lanier*, 520 U.S. at 266. A judicial construction of a penal statute violates the principle of
10 fair warning “only where it is ‘unexpected and indefensible by reference to the law which had
11 been expressed prior to the conduct in issue.’” *Rogers*, 532 U.S. at 462 (quoting *Bouie*, 378
12 U.S. at 462).

13
14 The touchstone of the due process analysis is “whether the statute, either standing alone
15 or as construed, made it reasonably clear at the relevant time that the defendant’s conduct was
16 criminal.” *Lanier*, 520 U.S. at 267. The same standard applies even in the First Amendment
17 context: “perfect clarity and precise guidance have never been required even of regulations that
18 restrict expressive activity.” *United States v. Williams*, 553 U.S. 285, 304, 128 S.Ct. 1830
19 (2008) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 794, 109 S.Ct. 2746 (1989)). In
20 cases involving challenges to a state-court conviction, “a state court’s interpretation of state
21 law, including one announced on direct appeal of the challenged conviction, binds a federal
22 court sitting in habeas corpus.” *Bradshaw v. Richey*, 546 U.S. 74, 76, 126 S.Ct. 602 (2005).

23
24 The Washington Court of Appeals rejected Mr. Monschke’s challenge alleging that
25 RCW 10.95.020(6) was unconstitutionally vague:
26

1 The legislature did not define “group,” “identifiable,” or “hierarchy,” but
2 these terms are commonly understood and are not ambiguous. A “group” is “a
3 number of individuals bound together by a community of interest, purpose, or
4 function,” or a “number of persons associated formally or informally for a
5 common end or drawn together through an affinity of views or interests.”
6 WEBSTERS THIRD NEW INT’L DICTIONARY 1004 (3d ed. 1976); *see also*
7 *id.* at 1123 (defining “ideology” as “a manner or the content of thinking
8 characteristic of an individual, group, or culture”). A group is “identifiable” if it
9 is “subject to identification” or “capable of being identified.” WEBSTERS
10 THIRD NEW INT’L DICTIONARY 1004 (3d ed. 1976). A “hierarchy” is “the
11 classification of a group of people with regard to ability or economic or social
12 standing.” WEBSTERS THIRD NEW INT’L DICTIONARY 1066 (3d ed. 1976).

13 When considered together, these definitions express the legislature’s
14 determination that a person’s legal culpability for murder is greater if the murder
15 is committed to advance the murderer’s standing amongst a number of persons
16 subject to identification and bound together, whether formally or informally, by a
17 shared ideology or affinity of views. The range of groups falling within RCW
18 10.95.020(6) is nearly infinite and can include such entities as a cheerleading
19 squad, a law firm, the Republican or Democratic Party, or the Catholic church.
20 RCW 10.95.020(6) does not limit the structure or size of such a group or the
21 nature of its ideology because such qualifiers are not necessary.

22 No. 26, Exh. 23, at 12-13.

23 The appellate court next reviewed the testimony from Mr. Monschke’s trial to
24 determine whether white supremacy falls within the meaning of the statute’s terms. The court
25 focused on the testimony of the two experts on white supremacist groups and ideology, Dr.
26 Mark Pitcavage and Dr. Randy Blazak, and concluded that “[u]nder the plain language of
RCW 10.95.020(6), white supremacy is an ‘identifiable group’ with a ‘hierarchy.’” *Id.* at 13.

27 As Pitcavage explained, white supremacists share a set of beliefs and
28 customs and are bound together by a mission to “secure the existence of our race
29 and a future for white children.” 25 RP at 1598. Both Pitcavage and Blazak
30 agreed that this mission embodies the white supremacist ideology. Also,
31 according to Pitcavage, white supremacists have a “hierarchy.” The hierarchy is
32 not in the formal militaristic or corporate sense, but in a “social standing” sense:
33 “[S]omeone who’s perceived to be really standing up for the white race, really
34 being a white warrior, gets more result of status, gets more respect.” 25 RP at
35 1635.

1 Blazak's testimony also supports the conclusion that white supremacy
2 falls within RCW 10.95.020(6). The thrust of Blazak's testimony was that white
3 supremacy was not an "identifiable group" because, if it was, it would be "[a]
4 very broad-based group," similar to "people who are liberal, people who are
5 conservative, environmentalists, pro death penalty people." 34 RP at 2957-58.
6 But the breadth of the group base is immaterial provided that the group is
7 identifiable, has a hierarchy, and shares an ideology. As Blazak testified, white
8 supremacists are a "finite number of people" who can be "identified" by their
9 common ideology that "white people are superior and the white race is somehow
10 threatened." 34 RP at 2923-24. Thus, both Pitcavage and Blazak's testimony
11 reflected that white supremacy falls within the plain language of RCW
12 10.95.020(6).

13 ECF No. 26, Exh. 23, at 13-14.

14 After concluding that white supremacy was an identifiable group within the meaning of
15 RCW 10.95.020(6), the Court of Appeals rejected Mr. Monschke's vagueness challenge to the
16 statute:

17 A statute is vague if it does not give fair notice of the proscribed conduct
18 or clear standards to prevent arbitrary enforcement. *State v. Halstien*, 122 Wn.2d
19 109, 117, 857 P.2d 270 (1993). But a statute is not unconstitutionally vague
20 merely because a person cannot predict with complete certainty the exact point at
21 which his questionable actions are prohibited. *City of Seattle v. Eze*, 111 Wn.2d
22 22, 27, 759 P.2d 366 (1988). It is sufficiently definite if persons of ordinary
23 intelligence can understand the statute's meaning, notwithstanding some possible
24 areas of disagreement. *Eze*, 111 Wn.2d at 27. A statute "employ[ing] words with
25 a well-settled common law meaning, generally will be sustained against a charge
26 of vagueness." *Anderson v. City of Issaquah*, 70 Wn. App. 64, 75, 851 P.2d 744
(1993). We assess a vagueness challenge to a statute not implicating First
Amendment rights in light of the statute's application to the case at hand.
Halstien, 122 Wn.2d at 117.

As previously discussed, the term "group" is not ambiguous and its plain
dictionary meaning includes white supremacy. A person of ordinary intelligence
would understand that committing murder to advance one's position as a white
supremacist is prohibited by RCW 9A.32.030 and RCW 10.95.020(6).
Monschke's vagueness challenge fails accordingly.

ECF No. 26, Exh. 23, at 15-16.

1 There was nothing unreasonable or unforeseeable about the state court’s analysis and
2 construction of RCW 10.95.020(6). The court used dictionary definitions of such common
3 terms as “group,” “identifiable,” and “hierarchy” as contained in the statute. The Washington
4 Court of Appeals’ adjudication of the vagueness challenge was a reasonable application of the
5 governing “fair notice” principles announced by the United States Supreme Court. The state
6 court’s decision is entitled to deference under 28 U.S.C. § 2254(d). Thus, Mr. Monschke’s
7 claim that that RCW 10.95.020(6) is unconstitutionally vague should be denied.
8

9 The undersigned recommends that Claim 1 be denied.

10 **B. Claim Two – RCW 10.95.020(6) Punishes First Amendment-Protected Activity**

11 In his second ground for relief Mr. Monschke complains that RCW 10.95.020(6), as
12 construed by the Washington Court of Appeals, unconstitutionally authorizes punishment for
13 the exercise of free speech and association rights under the First Amendment. ECF No. 1, at
14 7; ECf No. 30, at 15-20. He argues that the jury was permitted to consider and punish him for
15 his constitutionally protected beliefs and associations. He argues that his case is “akin” to *State*
16 *v. Rupe*, 101 Wash.2d 664, 683 P.2d 571 (Wash. 1984) and “mirrors” *Dawson v. Delaware*,
17 505 U.S. 159, 112 S.Ct. 1093 (1992).
18

19 In *Rupe*, the Washington Supreme Court held that a defendant’s constitutional right to
20 possess weapons could not be used against him in a criminal trial completely unrelated to the
21 use of those weapons. *Rupe*, 683 P.2d at 596. In *Dawson*, the United States Supreme Court
22 held that the defendant’s membership in the Aryan Brotherhood had no relevance to the
23 sentencing proceeding when that membership was not in any way tied to the murder of his
24 white victim. *Dawson*, 503 U.S. at 166. In this case, however, the record reflects that evidence
25 of Mr. Monschke’s hate-based beliefs and his affiliation with groups advocating violence was
26

1 offered to and did tend to explain his motive for attacking a white homeless stranger who was a
2 possible drug user. The evidence established and explained the plan for Frye and Butters to
3 earn “red shoelaces” and “bolts”, and for Mr. Monschke to advance his status as a white
4 supremacist. The evidence also made it more probable that Townsend’s murder was
5 premeditated.

6
7 The testimony and other evidence admitted at Mr. Monschke’s trial included, *e.g.*,
8 Monschke’s repeated use of racial epithets, (ECF No. 26, Exh. 4, at 1381-83); his possession of
9 white supremacist literature, musical recordings, and paraphernalia, such as flags, books,
10 flyers, and pamphlets (*id.*, Exh. 7, at 1782-95, *see also* Exh. 6, at 10-18, 25-48, Exh. 12, at
11 2585-90; his association with white supremacy group members and leaders and attendance at
12 gatherings of “skinheads” (*id.*, Exh. 6, at 179, 182-83; *see also* Exh. 12, at 2600-01); his
13 repeated viewing and apparent enjoyment of the film *American History X*, particularly the
14 violent “curb stomping” scene in that film (*id.*, Exh. 12, at 2588-90); his effort to recruit others
15 to white supremacy (*id.*, Exh. 6, at 13-17, 25-26); and his postings on racist Internet message
16 boards (*id.*, Exh. 12, at 2663-68; Exh. 13, at 2686, 2689-2700). The admissibility of the white
17 supremacist literature and paraphernalia was the subject of the State’s motion in limine. The
18 trial court heard argument and made rulings on an item-by-item basis. ECF No. 26, Exh. 2,
19 1093-1141. The trial court admitted the evidence of Mr. Monschke’s white supremacist views
20 but on several occasions gave the jury an instruction limiting the purpose for which the jury
21 could consider the evidence. *See, e.g.*, ECF No. 26, Exh. 7, 1787 (“Evidence regarding white
22 suprem[ac]ist literature and materials seized at the defendant’s residence is being admitted for
23 the purpose of proving motive, premeditation and for the circumstances surrounding the
24 alleged crime. You must not consider the evidence for any other purpose.”).

1 The Washington Court of Appeals rejected Mr. Monschke's claim that the admission of
2 this evidence violated his right to engage in First Amendment protected activity:

3 Monschke asserts that "[i]t is error to permit the state to ask the jury to
4 draw negative inferences from the exercise of any constitutional right." Br. of
5 Appellant at 48. We note, as the Washington Supreme Court has, that "there is a
6 distinction between making speech the crime itself, or an element of the crime,
7 and using speech to *prove* the crime." *Halstien*, 122 Wn.2d at 125 (quoting *State*
8 *v. Plowman*, 314 Or. 157, 167, 838 P.2d 558 (Or. 1992), *cert. denied*, 508 U.S.
9 974 (1993)). "The First Amendment ... does not prohibit the evidentiary use of
10 speech to establish the elements of a crime or to prove motive or intent."
11 *Halstein*, 122 Wn.2d at 125 (alteration in original) (quoting *Mitchell*, 508 U.S. at
12 489). Evidence of a defendant's exercise of a First Amendment right may be
13 admissible when relevant to an issue in the case. *Campbell*, 78 Wn.App. at 822;
14 *see, e.g., United States v. Abel*, 469 U.S. 45, 105 S. Ct. 465, 83 L. Ed. 2d 450
15 (1984) (prosecution could establish a defense witness's bias by showing that both
16 the defendant and the witness were members of the Aryan Brotherhood and that
17 members were sworn to lie for each other); *Barclay v. Florida*, 463 U.S. 939, 949,
18 103 S. Ct. 3418, 77 L. Ed. 2d 1134 (1983) (plurality) (trier of fact could consider
19 "the elements of racial hatred" in the crime as well as the defendant's "desire to
20 start a race war" in assessing whether the crime was "especially heinous,
21 atrocious, or cruel").

22 No authority supports Monschke's claim that admitting evidence of his
23 affiliations and beliefs was reversible error and automatic violation of his
24 constitutional rights. *Contra Dawson v. Delaware*, 503 U.S. 159, 165, 112 S. Ct.
25 1093, 117 L. Ed. 2d 309 (1992) ("[T]he Constitution does not erect a *per se*
26 barrier to the admission of evidence concerning one's beliefs and associations at
sentencing simply because those beliefs are protected by the First Amendment.").
The question of trial court error in allowing such evidence depends on whether
this evidence was relevant and admissible to prove an element of aggravated first
degree murder charge. The relevance threshold is "very low." *State v. Darden*,
145 Wn.2d 612, 621, 41 P.3d 1189 (2002). Evidence is relevant if it has any
tendency to make the existence of any fact that is of consequence to the
determination of the action more probable or less probable than it would be
without the evidence. ER 401. We review the decision to admit evidence for
abuse of discretion. *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002).

23 Monschke argues that the trial court erred in concluding that white
24 supremacist evidence was admissible under ER 404(b). That rule prohibits
25 evidence of prior acts to prove the defendant's propensity to commit the charged
26 crime. But evidence of a defendant's prior acts may be admitted for other limited
purposes under ER 404(b), including to establish motive, intent, and to explain
the circumstances surrounding the alleged crime. *State v. Brown*, 132 Wn.2d,

570-71, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998); *State v. Cook*, 131 Wn. App. 845, 849-50, 129 P.3d 834 (2006). Evidence of membership in a group may be relevant evidence of premeditation and a defendant's motive when there is a sufficient nexus between the group affiliation and the motive for committing the crime. *State v. Boot*, 89 Wn. App. 780, 789, 950 P.2d 964, *review denied*, 135 Wn.2d 1015 (1998); *Campbell*, 78 Wn. App. at 822. Such evidence is also admissible under RCW 10.95.020(6) to establish that the defendant committed murder to advance his position in the hierarchy of an organization, association, or identifiable group.

Monschke's entire ER 404(b) argument is as follows:

[T]he only connection between the "white supremacist" evidence introduced at trial, [Monschke] and premeditation or motive was the inference that a person who believes in the supremacy of the white race is the kind of person who would commit a murder. ... This is the precise inference forbidden by ER 404(b).

Br. of Appellant at 58-59. But Monschke incorrectly summarizes the evidence presented at trial. According to the record, the evidence admitted at trial not only established Monschke's belief in the superiority of the "white race," but also Monschke's hatred and hostility toward anyone he deemed inferior. This evidence included: literature, paraphernalia, and pictures associated with the Nazi movement and the highly violent subgroup, National Alliance; literature denigrating minorities; and a movie Monschke particularly enjoyed because of a scene where a minority is shot and curb stomped. Monschke's hate-based beliefs and his affiliation with groups advocating violence did tend to explain Monschke's motive for attacking a white homeless stranger who was a possible drug user. The evidence established and explained the plan for Frye and Butters to earn red shoelaces and bolts, and for Monschke to advance his status as a white supremacist. The evidence made it more probable that Townsend's murder was premeditated. ... In addition, the evidence explained the circumstances surrounding the crime, including the apparent "curb stomping" of Townsend's head as he lay on the railroad track. The court did not abuse its discretion in admitting evidence that Monschke was affiliated with white supremacist groups.

ECF No. 26, Exh. 23, at 21-24 (citing *State v. Stenson*, 132 Wn.2d 668, 702, 940 P.2d 1239 (1997)).

As discussed above, RCW 10.95.020(6) is not aimed at constitutionally protected conduct. The statute is content neutral and requires an enhanced punishment for committing murder if the murder was committed to obtain, maintain, or advance one's position in the

1 hierarchy of an organization, association, or identifiable group. Mr. Monschke was not
2 prosecuted for expressing white supremacist views or for his association with persons who held
3 such views. He was convicted of the premeditated murder of Randall Townsend. The
4 Washington Court of Appeals reasonably concluded that evidence of Mr. Monschke's hate-
5 based beliefs and affiliations tended to prove his motive for killing Mr. Townsend and made it
6 more probable that the murder was premeditated.

7
8 Federal law is not to the contrary. "The First Amendment, moreover, does not prohibit
9 the evidentiary use of speech to establish the elements of a crime or to prove motive or intent.
10 Evidence of a defendant's previous declarations or statements is commonly admitted in
11 criminal trials subject to evidentiary rules dealing with relevancy, reliability, and the like."
12 *Mitchell*, 508 U.S. at 489. Allowing a jury to draw logical conclusions about the defendant's
13 state of mind based on evidence of the defendant's protected speech does not interfere with the
14 exercise of the right to speak. *Dressler v. McCaughtry*, 238 F.3d 908, 915 (7th Cir. 2001).

15
16 The Washington Court of Appeals' decision that the white supremacy evidence was
17 relevant and admissible was neither contrary to, nor an unreasonable application of Supreme
18 Court precedent governing similar First Amendment claims. Thus, the undersigned finds that
19 Mr. Monschke is not entitled to federal habeas relief on this claim and that Claim 2 should be
20 denied.

21 **C. Claim 3 – Limiting Jury Instruction – Evidence of White Supremacist Beliefs**

22
23 In his third ground for relief Mr. Monschke asserts that the trial court's limiting
24 instruction concerning the jury's consideration of his white supremacist literature and materials
25 allowed the jury to consider First Amendment-protected conduct as evidence of guilt. ECF No.
26 1, at 8; ECF No. 30, at 20-22.

1 The challenged instruction told the jury that “[e]vidence regarding white suprem[ac]ist
2 literature and materials seized at the defendant’s residence is being admitted for the purpose of
3 proving motive, premeditation and for the circumstances surrounding the alleged crime. You
4 must not consider the evidence for any other purpose.” ECF No. 26, Exh. 7, at 1787. The
5 Washington Court of Appeals rejected Mr. Monschke’s claim that this limiting instruction
6 allowed the jury to consider First Amendment-protected conduct as evidence of guilt:
7

8 Here, the court’s limiting instruction told the jury that it could consider the
9 white supremacist evidence only to establish motive, premeditation, and to
10 explain the circumstances surrounding the alleged crime. As we discussed above,
11 the evidence was relevant and properly admitted for the jury’s consideration on
12 these issues. The instruction accurately stated the law and the legally permissible
13 limits of the evidence. The trial court did not comment on the evidence by giving
14 this limiting instruction.

15 ECF No. 26, Exh. 23, at 24-25.

16 The law presumes that juries follow their instructions. *Weeks v. Angelone*, 528 U.S.
17 225, 234, 120 S.Ct. 727 (2000); *United States v. Olano*, 507 U.S. 725, 740, 113 S.Ct. 1770
18 (1993); *Francis v. Franklin*, 471 U.S. 307, 324 n. 9, 105 S.Ct. 1965 (1985). More particularly,
19 juries are presumed to follow cautionary or limiting instructions. *Richardson v. Marsh*, 481
20 U.S. 200, 211, 107 S.Ct. 1702 (1987) (describing this presumption as an “almost invariable
21 assumption of the law”); *Tennessee v. Street*, 471 U.S. 409, 414-15, 105 S.Ct. 2078 (1985)
22 (trial court’s limiting instruction, regarding admission of confession of defendant’s accomplice
23 to rebut defendant’s claim that his own confession was the product of coercion, was adequate
24 to protect defendant’s Confrontation Clause rights); *Marshall v. Lonberger*, 459 U.S. 422, 438
25 n. 6, 103 S.Ct. 843 (1983); *Brown v. Ornoski*, 503 F.3d 1006, 1018 (9th Cir. 2007). “The rule
26 that juries are presumed to follow their instructions is a pragmatic one, rooted less in the
absolute certitude that the presumption is true than in the belief that it represents a reasonable

1 practical accommodation of the interests of the state and the defendant in the criminal justice
2 process.” *Richardson*, 481 U.S. at 211.

3 The Washington Court of Appeals confirmed that the white supremacist evidence was
4 admissible in Mr. Monschke’s case to prove motive, intent, and the circumstances surrounding
5 the trial. The Washington Court of Appeals also confirmed that the trial court’s limiting
6 instruction properly explained the limited purposes for which the evidence was being admitted.
7 Clearly established federal law holds that a limiting instruction under these circumstances is
8 sufficient to prevent the jury from considering the evidence for any other purpose.
9

10 The Washington Court of Appeals’ decision concerning Mr. Monschke’s challenge to
11 the limiting instruction used in his case is entitled to deference under 28 U.S.C. § 2254(d). The
12 undersigned concludes that Claim 3 should be denied.

13 **D. Claim 4 – Confrontation Clause Violations**

14 In his fourth claim for federal habeas relief, Mr. Monschke argues that the trial court’s
15 rulings denied him the Sixth Amendment right to confront and cross-examine co-defendant
16 David Pillatos, State’s expert Dr. Mark Pitcavage, and Detective Jeffrey Shipp. ECF No. 26, at
17 10, 31-32; ECF No. 30, at 23-39.²
18

19 The Confrontation Clause of the Sixth Amendment provides: “In all criminal
20 prosecutions, the accused shall enjoy the right . . . to be confronted by the witnesses against
21

22 ² In his reply, Petitioner presented at least two new claims regarding Dr. Pitcavage’s testimony. He claims that
23 allowing the state to introduce expert testimony on the issue of whether “white supremacy” is an identifiable group
24 within the meaning of the aggravated murder statute invaded the province of the jury and violated his right to a jury
25 determination of a fact relevant to his sentence in violation of the principles articulated in *Blakely v. Washington*,
26 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004) and that Dr. Pitcavage’s testimony was inadmissible under
ER 702 because it was not based on theories or principles generally accepted in any scientific or academic
community. ECF No. 30, at 26-32. Because arguments cannot be raised for the first time in a reply, *see Cacoperdo*
v. Demosthenes, 37 F.3d 504, 507 (9th Cir.1994), the Court has not considered these claims.

1 him.” U.S. Const. Amend. VI. The Confrontation Clause applies to the states through the
2 Fourteenth Amendment, *Pointer v. Texas*, 380 U.S. 400, 403, 85 S.Ct. 1065 (1965), and it
3 guarantees criminal defendants the right to confront and cross-examine the witnesses against
4 them. *Chambers v. Mississippi*, 410 U.S. 284, 294-95, 93 S.Ct. 1038 (1973). “The main and
5 essential purpose of confrontation is to secure for the opponent the opportunity of cross-
6 examination.” *Davis v. Alaska*, 415 U.S. 308, 315-16, 94 S.Ct. 1105(1974). But the
7 defendant’s right to cross-examination is far from absolute. “[T]rial judges retain wide latitude
8 . . . to impose reasonable limits on . . . cross-examination based on concerns about, among
9 other things, harassment, prejudice, confusion of the issues, the witness’ safety, or
10 interrogation that is repetitive or only marginally relevant.” *Delaware v. Van Arsdall*, 475 U.S.
11 673, 679, 106 S.Ct. 1431 (1986); *see also Davis v. Alaska*, 415 U.S. at 316 (cross-examination
12 is “[s]ubject always to the broad discretion of a trial judge”). The defendant will meet his
13 burden of showing a violation of the right to confrontation only if he shows that a reasonable
14 jury might have received a significantly different impression of the witness’s credibility had
15 the defense been permitted to pursue its proposed line of cross-examination. *Van Arsdall*, 475
16 U.S. at 680. In essence, what the Constitution guarantees is “an *opportunity* for effective
17 cross-examination, not cross-examination that is effective in whatever way, and to whatever
18 extent, the defense might wish.” *Delaware v. Fensterer*, 474 U.S. 15, 20, 106 S.Ct. 292 (1985)
19 (emphasis in original). Violations of the right to confrontation are subject to the harmless error
20 standard. *Van Arsdall*, 475 U.S. at 684.

24 **1. David Pillatos**

25 The State intended to call David Pillatos, one of the co-defendants in the murder, as a
26 witness during its case-in-chief. Prior to his testimony, Pillatos’s defense counsel asked the

1 court to inquire, outside the jury's presence, whether Pillatos would refuse to testify – Pillatos
2 had instructed his attorney to inform the prosecution he would refuse to answer any questions.
3 ECF No. 26, Exh. 9, at 2017-18. Counsel was not certain whether his client's refusal to testify
4 was based on the Fifth Amendment but did not want the court to plant that idea. *Id.* at 2018-
5 19. The court inquired of Pillatos whether it was true he would refuse to testify. *Id.* at 2022.
6 Pillatos confirmed he would not testify but stated his refusal was not based on the Fifth
7 Amendment; the sole reason he would not answer any questions was because he did not want
8 to assist the State in any way. *Id.* ("I ain't helping the prosecutors out. I don't like them.").
9 He did, however, state he would answer any questions posed to him by Mr. Monschke's
10 defense counsel. *Id.* at 2023-26.

12 In the presence of the jury, Pillatos was called as a witness and stated his name for the
13 record. *Id.* at 2029. He refused to answer any substantive questions posed by the prosecutor,
14 however. *Id.* ("I politely refuse to answer any questions."). He acknowledged he could be held
15 in contempt for refusing to answer, but he again indicated he would answer questions posed by
16 defense counsel. *Id.* at 2029-30. The prosecutor then "defer[red] to the defense." *Id.* at 2030.
17 Defense counsel began questioning Pillatos, using leading questions. *Id.* The prosecutor
18 objected and asked that the defense's examination be in the form of non-leading questions. *Id.*
19 Defense counsel insisted he should be allowed to pose leading questions to Pillatos: "This is
20 cross-examination." *Id.* The court, however, corrected defense counsel – "It's not cross-
21 examination" – and indicated that counsel should conduct a direct examination. *Id.* ("If you
22 wish to ask questions, it will have to be in the manner of direct testimony."). Defense counsel
23 chose to proceed and conducted a 70-page direct examination of Pillatos. *Id.* at 2031-2101.
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25
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1 The state cross-examined, *id.* at 2101-25, and the defense followed with a redirect examination
2 in which the court allowed the use of some leading questions. *Id.* at 2126-38.

3 The next morning, the defense moved for a mistrial arguing that the situation involving
4 Pillatos's "unpredictable and unpreventable" behavior rendered the trial unfair. Specifically,
5 defense counsel alleged that some of Pillatos's disrespectful, sarcastic, and "bizarre" answers,
6 as well as his demeanor while testifying, adversely affected Mr. Monschke's case. ECF No.
7 26, Exh. 10, at 2149-51. The defense argued that (1) Pillatos had testified on direct about a
8 supposed organization called the "Gay Aryan Skinheads," *see* Exh. 9, at 2072; and (2) on
9 cross-examination by the State, Pillatos accused Detective Ringer and deputy prosecutor Greg
10 Greer of placing the victim's body on the railroad tracks and stomping on the victim's head,
11 *see id.* at 2125. *Id.*, Exh. 10, at 2151.

12
13 The court denied the motion for a mistrial. ECF No. 26, Exh. 10, at 2155. The court
14 observed that it appeared the defense had a change of heart and now regretted the choice it
15 made the day before to question Pillatos at all. *Id.* The court noted that Pillatos did not act out
16 in any way and, although some of his answers were unusual, he did nothing to warrant granting
17 a mistrial. *Id.*

18
19 The Washington Court of Appeals rejected Mr. Monschke's argument that the trial
20 court abused its discretion by prohibiting him from asking Pillatos leading questions:

21
22 Monschke did not ask to have Pillatos declared a hostile witness, *see* ER
23 611(c), nor does he explain how the court's ruling precluding his use of leading
24 questions prejudiced his defense. In addition, because Pillatos refused to answer
25 the State's questions, there was no testimony to cross-examine Pillatos about. *See*
26 ER 611(b)-(c) (cross-examination should be limited to the subject matter of the
direct examination; leading questions generally permissible for cross-examination
but not direct examination). The court thus had a reasonable basis for requiring
Monschke's questioning to be in the form of a direct examination just as it would

1 have done if the defense had called Pillatos to the stand out of order in the middle
2 of the State's case-in-chief. The trial court did not abuse its discretion here.

3 ECF No. 26, Exh. 23, at 31.

4 The record clearly reflects that Mr. Monschke was not deprived of the opportunity to
5 "confront" Pillatos. To label Pillatos a witness "against" Monschke would ignore the fact that
6 Pillatos did not testify for the State at all. The trial court's ruling requiring the defense to ask
7 non-leading questions does not present a federal constitutional ground for relief. The manner
8 in which evidence is presented at trial is a matter largely left to the trial court's broad
9 discretion. *Larson v. Palmateer*, 515 F.3d 1057, 1065 (9th Cir. 2008). There is no clearly
10 established Supreme Court precedent that would have required the trial court to proceed in a
11 different manner.
12

13 The decision of the Washington Court of Appeals on this issue was neither contrary to,
14 nor an unreasonable application of, clearly established Supreme Court precedent. The state
15 court's decision is entitled to deference under 28 U.S.C. § 2254(d), and the undersigned
16 recommends that this claim for federal habeas relief be denied.

17 **2. Dr. Pitcavage**

18 The State brought a motion in limine to exclude certain cross-examination of the State's
19 expert, Dr. Mark Pitcavage. Pitcavage was employed as the Director of Fact Finding for the
20 Anti-Defamation League (ADL) since 2000. ECF No. 26, Exh. 5, at 1584-86. The State
21 sought to exclude any cross-examination about a civil suit brought against the ADL in the
22 1980s by a Colorado couple who alleged they had been defamed by the ADL's accusation that
23 they were anti-Semitic. *Id.* at 1577-79. Defense counsel asserted that this information was
24 relevant to establishing the witness's bias and the "organizational bias" of the ADL. *Id.* at
25
26

1 1579. The trial court stated it would allow the defense to ask questions with regard to any bias
2 or prejudice on the part of Dr. Pitcavage and the ADL, but drew the line at inquiry about a
3 lawsuit against the ADL many years earlier: “I’m not going to turn this trial into a trial to [sic]
4 the ADL. I’m not going to allow any of this information unless you can tie it to this witness.”
5 *Id.* at 1582.

6
7 The Washington Court of Appeals upheld the trial court’s ruling:

8 The court’s refusal to permit questioning on this point was a proper
9 exercise of its discretion: the court did allow Monschke to explore any bias or
10 prejudice of the ADL, but the lawsuit Monschke sought to raise was remote,
11 isolated, and had not involved Pitcavage. Thus, it was an attempt to impeach on a
12 collateral matter and irrelevant. *State v. Descoteaux*, 94 Wn.2d 31, 37-38, 614
13 P.2d 179 (1980) (witness cannot be impeached on an issue collateral to the issue
14 being tried; issue is collateral if it is not admissible independently of the
15 impeachment purpose), *overruled on other grounds by State v. Danforth*, 97
16 Wn.2d 255, 257 n. 1, 643 P.2d 882 (1982).

17 ECF No. 26, Exh. 23, at 31.

18 This holding is not inconsistent with the “wide latitude” given to trial judges under the
19 Sixth Amendment. *Delaware v. Van Arsdall*, 475 U.S. at 679; *see also Davis v. Alaska*, 415
20 U.S. at 316 (cross-examination is “[s]ubject always to the broad discretion of a trial judge”).
21 Mr. Monschke meets his burden of showing a violation of the right to confrontation only if he
22 shows that a reasonable jury might have received a significantly different impression of the
23 witness’s credibility had the defense been permitted to pursue its proposed line of cross-
24 examination. *Van Arsdall*, 475 U.S. at 680. As the state courts correctly noted, a lawsuit against
25 the ADL that occurred over a decade before Pitcavage was employed at the ADL is clearly
26 collateral to the issue of whether the information presented by Pitcavage at trial was truthful
and reliable.

1 The decision of the Washington Court of Appeals on this issue was neither contrary to,
2 nor an unreasonable application of, clearly established Supreme Court precedent. The
3 undersigned recommends that this claim for federal habeas relief be denied.

4 **3. Detective Jeffrey Shipp**

5 Mr. Monschke alleges that Detective Jeffrey Shipp's testimony was based in part on
6 testimonial hearsay and by allowing this testimony, the trial court denied him his Sixth
7 Amendment right to confront and cross-examine the absent witnesses. ECF No. 1, at 32; ECF
8 No. 30, at 35-39.

10 Detective Shipp, one of the main law enforcement investigators in the case, explained
11 what the managers of the Rich Haven Apartments told him about Mr. Monschke's co-
12 defendants Scotty Butters, Tristain Frye, and David Pillatos when they had briefly resided at
13 the Rich Haven Apartments shortly before the murder took place. The three were evicted from
14 their apartment for yelling racial slurs at passersby on the sidewalk below, for painting
15 distinctive racist graffiti on the apartment building, and for Butters' actions in selling imitation
16 crack cocaine to a drug addict. ECF No. 26, Exh. 6, at 136-51. The State presented this
17 testimony to explain how Detective Shipp's investigation led him to focus on Butters, Frye,
18 and Pillatos, mainly because the graffiti at the crime scene was similar to the graffiti found at
19 the Rich Haven Apartments. The defense did not object to the apartment managers' out-of-
20 court statements, either on hearsay grounds or any other basis, and it appears the defense
21 wanted this evidence presented. The defense adduced similar information in its cross-
22 examination of Detective Shipp, emphasizing the point that the evidence did not pertain to Mr.
23 Monschke. *See id.* at 186-88; Exh. 7, at 1729-30.
24
25
26

1 The “principal evil” at which the Confrontation Clause is directed is the use of ex parte
2 examinations or formal statements to government officers as evidence against the accused.
3 *Crawford v. Washington*, 541 U.S. 36, 50-53, 124 S.Ct. 1354 (2004). The governing rules
4 announced by the Supreme Court in its Confrontation Clause cases reflect this focus and
5 carefully distinguish between testimonial and non-testimonial hearsay because “not all hearsay
6 evidence implicates the Sixth Amendment’s core concerns.” *Id.* at 51. Under the *Crawford*
7 standard, “testimonial” hearsay may not be introduced against a defendant unless (1) the
8 declarant is unavailable at trial, and (2) the defendant had a prior opportunity to cross-examine
9 the declarant. *Id.* at 68-69. In *Davis v. Washington*, 547 U.S. 813, 126 S.Ct. 2266 (2006), the
10 Court clarified that nontestimonial hearsay is not subject to the Confrontation Clause at all.
11 “Only [testimonial statements] cause the declarant to be a ‘witness’ within the meaning of the
12 Confrontation Clause.” *Id.* at 821 (citing *Crawford*, 541 U.S. at 51). *See also Whorton v.*
13 *Bockting*, 549 U.S. 406, 420, 127 S.Ct. 1173 (2007) (Confrontation Clause has no application
14 to non-testimonial statements). The State agreed that the statements attributed to the apartment
15 managers were testimonial.
16

17
18 The Confrontation Clause does not apply to out-of-court statements, even if testimonial
19 in nature, that are admitted for purposes other than establishing the truth of the matter asserted.
20 *Crawford*, 541 U.S. at 59 n. 9 (citing *Tennessee v. Street*, 471 U.S. 409, 414, 105 S.Ct. 2078,
21 1985)). *See United States v. Hicks*, 575 F.3d 130, 143-44 (1st Cir. 2009) (recorded statements
22 made by defendant’s girlfriend during jail phone call from defendant were admitted not to
23 prove the truth of the matter asserted but to provide context for defendant’s admissions; thus,
24 no Confrontation Clause implications); *Moses v. Payne*, 555 F.3d 742, 755-56 (9th Cir. 2009)
25 (out-of-court statement regarding defendant’s prior assault of murder victim introduced not to
26

1 prove the truth of the matter asserted but rather to explain why social worker contacted Child
2 Protective Services; not violative of Confrontation Clause); *United States v. Tolliver*, 454 F.3d
3 660, 666 (7th Cir. 2006) (statements of confidential informant made during recorded
4 conversation with defendant were admissible to place defendant's admissions on the tapes into
5 context, thereby making defendant's admissions intelligible for the jury; no Confrontation
6 Clause violation because the declarant was not a witness against the defendant); *United States*
7 *v. Hendricks*, 395 F.3d 173, 183-84 (3d Cir. 2005) (same).

9 Violations of the Confrontation Clause involving the admission of testimonial hearsay
10 are subject to harmless error analysis. *Melendez-Diaz v. Massachusetts*, 557 U.S. __, __ n. 14,
11 129 S. Ct. 2527, 2542 n.14 (2009); *Moses v. Payne*, 555 F.3d at 755. On direct appeal such
12 errors are reviewed under the "harmless beyond a reasonable doubt" standard. *Delaware v.*
13 *Van Arsdall*, 475 U.S. 673, 684, 106 S.Ct. 1431 (1986); *Chapman v. California*, 386 U.S. 18,
14 24, 87 S.Ct. 824 (1967). On collateral review, the question is whether the error had
15 "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v.*
16 *Abrahamson*, 507 U.S. 619, 637, 113 S.Ct. 1710 (1993); *Moses v. Payne*, 555 F.3d at 755.

18 The Washington Court of Appeals rejected Mr. Monschke's claim that the apartment
19 managers' out-of-court statements violated his Confrontation Clause rights:

20 It is unnecessary for us to address whether a defendant may raise a
21 testimonial hearsay objection for the first time on appeal for, even assuming he
22 can, there was no error here as the testimony was not hearsay. The State offered
23 Detective Shipp's testimony to explain the context and background of the
24 criminal investigation and how the investigation came to focus on Monschke,
25 Butters, Frye, and Pillatos; it was not offered to prove that Monschke's cohorts
26 were in fact yelling racial slurs, painting racist graffiti, or selling imitation drugs.
Such background testimony is not hearsay. *See State v. Lillard*, 122 Wn. App.
422, 437, 93 P.3d 969 (2004), *review denied*, 154 Wn.2d 1002, 113 P.3d 482
(2005); *State v. Post*, 59 Wn. App. 389, 394-95, 797 P.2d 1160 (1990), *aff'd*, 118
Wn.2d 596, 826 P.2d 172 (1992).

1 Furthermore, even if we assume that the statements were testimonial
2 hearsay, which we do not, any error in admitting the statements was harmless
3 beyond a reasonable doubt. The events at the Rich Haven Apartments reflected a
4 pattern of alarming behavior by Butters, Frye, and Pillatos, but it did not directly
5 inculcate Monschke. Moreover, the events Detective Shipp recounted were
6 cumulative of Butters, Frye, and Pillatos's testimony regarding their own racist
7 conduct. We find no merit in Monschke's claim that Detective Shipp's testimony
8 was prejudicial or that it violated his constitutional right to confront witnesses.

9 ECF No. 26, Exh. 23, at 27-28 (footnote omitted).

10 The record supports the state court's reasoning. The apartment managers' out-of-court
11 statements were not admitted to prove the truth of the matter asserted. Rather they were
12 offered for the non-hearsay purpose of explaining how Detective Shipp's initial investigation
13 led him to focus on Butters, Frye, and Pillatos, which subsequently led him to investigate Mr.
14 Monschke. Even if the statements were testimonial hearsay, any error in admitting the
15 evidence was harmless because none of the information contained in the apartment managers'
16 out-of-court statements pertained to Mr. Monschke.

17 The Washington Court of Appeals' adjudication of this claim was neither contrary to,
18 nor an unreasonable application of, clearly established federal law for purposes of 28 U.S.C. §
19 2254(d). Therefore, the undersigned recommends that Claim 4 be denied.

20 **E. Claim 5 – Testimony of Randy Blazak**

21 In his fifth ground for federal habeas relief, Mr. Monschke argues the trial court denied
22 him his right under the Compulsory Process Clause of the Sixth Amendment to present a
23 defense. Specifically, he takes issue with the trial court's ruling that he could not ask the
24 defense expert, Dr. Randy Blazak, about the phenomenon of white supremacist gangs in
25 juvenile institutions. ECF No. 1, at 32-33; ECF No. 30, at 40-41.

1 The Constitution guarantees criminal defendants the right to a meaningful opportunity
2 to present a complete defense, and it forbids the states from applying arbitrary rules of
3 evidence that exclude important defense evidence. *Holmes v. South Carolina*, 547 U.S. 319,
4 324, 126 S.Ct. 1727, (2006); *Chambers v. Mississippi*, 410 U.S. 284, 302, 93 S.Ct. 1038
5 (1973); *Washington v. Texas*, 388 U.S. 14, 2387 S.Ct. 1920 (1967). This right stems from the
6 Compulsory Process Clause of the Sixth Amendment and the Due Process Clause of the
7 Fourteenth Amendment. *Holmes, supra*. The Constitution, however, does not grant a criminal
8 defendant an “unfettered right to offer testimony that is incompetent, privileged, or otherwise
9 inadmissible under standard rules of evidence.” *Taylor v. Illinois*, 484 U.S. 400, 410, 108 S.Ct.
10 646 (1988). Even the right to present relevant testimony is not without limitation. *Rock v.*
11 *Arkansas*, 483 U.S. 44, 55, 107 S.Ct. 2704 (1987). The defense, no less than the State, must
12 comply with “established rules of procedure and evidence designed to assure both fairness and
13 reliability in the ascertainment of guilt and innocence.” *Chambers*, 410 U.S. at 301; *see also*
14 *Michigan v. Lucas*, 500 U.S. 145, 151-52, 111 S.Ct. 1743 (1991). “The mere invocation of
15 [the right to present a defense] cannot automatically and invariably outweigh countervailing
16 public interests.” *Taylor*, 484 U.S. at 414.

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19 A trial court’s exclusion of defense evidence under established evidence rules
20 ordinarily does not implicate any constitutional considerations because the Constitution gives
21 trial judges considerable leeway to exclude evidence. *United States v. Scheffer*, 523 U.S. 303,
22 308, 118 S.Ct. 1261 (1998); *Delaware v. Van Arsdall*, 475 U.S. 673, 679, 106 S.Ct. 1431
23 (1986). “State and federal rulemakers have broad latitude under the Constitution to establish
24 rules excluding evidence from criminal trials. Such rules do not abridge an accused’s right to
25 present a defense so long as they are not ‘arbitrary’ or ‘disproportionate to the purposes they
26

1 are designed to serve’.” *Scheffer*, 523 U.S. at 308 (quoting *Rock v. Arkansas*, 483 U.S. at 56;
2 *Michigan v. Lucas*, 500 U.S. at 151). What the Constitution prohibits is the exclusion of
3 critical, trustworthy defense evidence, particularly where the evidence directly refutes the
4 State’s allegations. *See, e.g., Holmes, supra* (rejecting as arbitrary a state rule excluding
5 evidence of a third party’s commission of the charged crime where the rule made admissibility
6 of such evidence turn on the strength of only the prosecution’s evidence); *Crane v. Kentucky*,
7 476 U.S. 683, 106 S.Ct. 2142 (1986) (blanket exclusion of defense evidence concerning the
8 circumstances surrounding defendant’s confession violated right to present a defense where his
9 sole defense was that there was no physical evidence otherwise linking him to crime and that
10 his confession was unreliable); *Chambers, supra* (arbitrary application of Mississippi’s
11 “voucher” rule and hearsay rule, which effectively prevented the defendant in a murder
12 prosecution from presenting evidence of a witness’s confessions to the same murder and from
13 impeaching the witness on the basis of his confessions); *Washington v. Texas*, 388 U.S. at 23
14 (arbitrary application of procedural statute preventing co-defendants or co-participants from
15 testifying for one another violated right to present a defense by excluding “a witness who was
16 physically and mentally capable of testifying to events that he had personally observed.”); *cf.*
17 *Green v. Georgia*, 442 U.S. 95, 99 S.Ct. 2150 (1979) (per curiam) (exclusion of defense
18 mitigation evidence during penalty phase of capital murder trial violated due process where
19 defendant attempted to show he was not present at time murder was committed by co-
20 defendant).

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24 Conversely, the Constitution permits trial judges to apply well-established evidence
25 rules to exclude evidence if its probative value is outweighed by other factors such as unfair
26 prejudice, confusion of the issues, or the potential to mislead the jury. *Holmes*, 547 U.S. at

1 326-27 (describing such rules of evidence as “familiar and unquestionably constitutional”)
2 (quoting *Montana v. Egelhoff*, 518 U.S. 37, 42, 116 S.Ct. 2013 (1996)); *Moses v. Payne*, 555
3 F.3d 742, 757-58 (9th Cir. 2009).

4 The defense called Dr. Blazak to testify as an expert in hate crimes and white
5 supremacist groups. During his direct examination, defense counsel asked Dr. Blazak whether
6 he had ever spoken with incarcerated youths in juvenile institutions and whether he had found
7 an incidence of race-based gangs in juvenile institutions. ECF No. 26, Exh. 14, at 2915-16.
8 After the prosecutor objected and out of the presence of the jury, defense counsel proffered that
9 Dr. Blazak would testify that juveniles join white supremacy gangs as a means of protecting
10 themselves from members of other gangs. *Id.* at 2916-17. The court asked defense counsel to
11 explain the relevancy of that information:
12

13 MR. BERNEBURG: It’s relevant because it explains how Kurtis got involved,
14 and corroborates his testimony.

15 THE COURT: How is that relevant to the case?

16 MR. BERNEBURG: That he’s not a bad person, Your Honor. This is something
17 that happened to Kurtis, not something that he chose to do.

18 ECF No. 26, Exh. 14, at 2917-18. The prosecutor objected on the ground that evidence of Mr.
19 Monschke’s character was not relevant and how or why he got involved in white supremacy
20 groups was also irrelevant. *Id.* at 2918. The trial court sustained the State’s objection. *Id.*

21 Prior to Dr. Blazak’s testimony, Mr. Monschke had testified about his recruitment into
22 a white power gang at the age of 12 when he was in a juvenile institution. ECF No. 26, Exh.
23 13, at 2754-57. He testified he joined because gangs drawn along racial lines were prevalent in
24 the juvenile institution and it was safer to be in a gang than not. *Id.* The prosecutor cross-
25 examined Mr. Monschke and inquired about his gang membership but the prosecutor did not
26

challenge the fact that Mr. Monschke may have joined a gang for reasons of personal safety.
Id., Exh. 14, at 2835-36.

The Washington Court of Appeals reviewed the trial court's evidentiary ruling and rejected Mr. Monschke's argument that the trial court denied him the right to present a defense. Exhibit 23, at 30-32.

Monschke argues that Blazak's testimony was necessary to explain "why he might join a white gang in custody and how that might have explained his participation in white pride or white power activities." Br. of Appellant at 89. How Monschke came to join a race-based group might have been relevant in a death penalty phase, but it was not relevant in determining guilt; what was relevant was his current beliefs, his current associations, and how those beliefs and associations played a role in his murder of a white homeless man. The trial court did not abuse its discretion in excluding this irrelevant evidence.

ECF No. 26, Exh. 23, at 32.

Respondent argues that the trial court's relevancy determination and exclusion of this part of Dr. Blazak's proposed testimony was not an exercise of arbitrary judicial power. Evidence of the reasons why Mr. Monschke may have chosen to join a white gang while he was in juvenile confinement was not relevant to any issues in the case and would not have refuted the State's allegations. The undersigned agrees with this reasoning.

The Washington Appellate Court's holding was neither contrary to, nor an unreasonable application of, Federal law as it relates to claims regarding the admissibility of evidence in state criminal trials. Therefore, the undersigned recommends that Claim 5 be denied.

F. Claim 6 – Prosecutorial Misconduct (Direct Examination of Terry Hawkins)

In his sixth ground for relief, Mr. Monschke contends the prosecutor committed misconduct during his direct examination of State's witness Terry Hawkins by asking whether

1 Hawkins had changed some of the details of his version of events at the urging of defense
2 counsel. ECF No. 1, at 33; ECF No. 30, at 42-46.

3 **1. Standard of Review**

4 “The Due Process Clause is not a code of ethics for prosecutors; its concern is with the
5 manner in which persons are deprived of their liberty.” *Mabry v. Johnson*, 467 U.S. 504, 511,
6 104 S.Ct. 2543 (1984), *abrogated in part on other grounds*, *Puckett v. United States*, 556 U.S.
7 129, n. 1, 129 S.Ct. 1423 (2009). Mere improprieties or breaches of courtroom decorum by a
8 prosecutor do not in themselves warrant federal habeas relief under 28 U.S.C. § 2254. Unless
9 the prosecutor’s conduct prejudiced a specific constitutional right (such as the privilege against
10 self-incrimination), federal habeas corpus claims alleging that a state prosecutor committed
11 misconduct are reviewed under the narrow standard of due process rather than the broad
12 exercise of supervisory power. *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S.Ct. 2464
13 (1986); *Donnelly v. DeChristoforo*, 416 U.S. 637, 642, 94 S.Ct. 1868 (1974). “Beyond the
14 specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited
15 operation. We, therefore, have defined the category of infractions that violate ‘fundamental
16 fairness’ very narrowly.” *Dowling v. United States*, 493 U.S. 342, 352, 110 S.Ct. 668 (1990).

17 Improper remarks or other conduct on the part of the prosecutor do not constitute a *per*
18 *se* due process violation. “[I]t ‘is not enough that the prosecutor’s remarks were undesirable or
19 even universally condemned.’ ... The relevant inquiry is whether the prosecutor’s comments
20 ‘so infected the trial with unfairness as to make the resulting conviction a denial of due
21 process.’” *Darden v. Wainwright*, 477 U.S. at 181. Even overzealous or obnoxious conduct by
22 a prosecutor does not automatically warrant federal habeas relief. *Furman v. Wood*, 190 F.3d
23 1002, 1005-06 (9th Cir. 1999); *Thomas v. Cardwell*, 626 F.2d 1375, 1387 (9th Cir. 1980), *cert.*
24
25
26

1 *denied*, 449 U.S. 1089 (1981). Prosecutorial misconduct constituting a due process violation
2 will warrant habeas relief only if the misconduct is prejudicial under the *Brecht* harmless error
3 standard. *Shaw v. Terhune*, 380 F.3d 473, 478 (9th Cir. 2004). Under *Brecht* a trial error is
4 presumed to be harmless unless the error had “substantial or injurious effect or influence in
5 determining the jury’s verdict.” *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993).

6 **2. Prosecutor’s Questioning of Terry Hawkins**

7
8 Mr. Monschke argues that the prosecutor improperly asked Terry Hawkins if he
9 recalled saying that defense counsel and the defense investigators were trying to get him to say
10 something that was not true. He argues that this line of questioning left the jury with the
11 impression that defense counsel had acted improperly. ECF No. 1, at 33; ECF No. 30, at 42.

12 Terry Hawkins and Cindy Pitman were the two homeless persons who found Randall
13 Townsend on the railroad tracks shortly after the beating. Hawkins testified on direct
14 examination, in contradiction to his earlier statements, that when he first saw the victim’s body
15 on the tracks, “he was on his stomach, laying facedown.” ECF No. 26, Exh. 3, at 1219. The
16 prosecutor pressed him on this point and asked whether Hawkins recalled telling him just two
17 weeks earlier that the victim was on his *back* rather than his front. *Id.* at 1226-27.

18
19 Q. Is someone talking to you and trying to get you to say something to help
20 out Mr. Monschke?

21 A. No. I’m not trying to help out, just tell the truth about what I seen.

22 Q. Do you recall telling me when we were in my office that you were
23 concerned that the defense attorneys and their investigators were trying to
24 get you to say things that were not true?

25 A. I knew at the time that they was trying to help one of the defendants get
26 off and so, I mean, I don’t know exactly if they’re doing their job or
whatever they’re doing. But they were just trying to find out exactly
where did I see all of the people at on the track.

1 Q. Do you recall telling me after meeting with them you were concerned they
2 were trying to get you to say things that were not true?

3 A. Well, yes. I probably told you that.

4 Q. That was two weeks ago?

5 A. I thought at the time that they was trying. Not trying to make me lie, but
6 just tell what I seen. That's basically all they was letting me know, just
7 tell the truth.

8 Q. Between the time that I last talked to you and today, have you talked to the
9 defense attorneys?

10 A. Yes.

11 Q. Have you discussed the issue of whether you saw Mr. Townsend on his
12 back or stomach?

13 A. No.

14 Q. Not at all?

15 A. No.

16 1228-1229.

17 Hawkins confirmed he had met with the defense attorneys between the time of his
18 recent meeting with the prosecutor (during which he stated the victim was on his back) and his
19 testimony in court. *Id.* He stated he had met with the defense attorneys on three separate
20 occasions of about one hour each. *Id.* at 1229-31. Hawkins also revealed that during each of
21 these defense interviews, the defense attorneys stated their opinion that Mr. Monschke was
22 innocent and related their theory of what they believed had occurred (and who did what) the
23 night of the assault. *Id.* at 1232-33.

25 The defense objected only twice during this line of questioning, once on the ground the
26 prosecutor was leading the witness, the other time on the ground the prosecutor was not

1 allowing the witness to answer. *Id.* at 1233. Later that day, after the prosecutor concluded his
2 direct examination, the defense moved for a mistrial on the basis of the prosecutor's questions
3 to Hawkins:

4 When Mr. Hawkins was on the witness stand, Mr. Greer went to great
5 lengths to attack Mr. Bauer and myself personally in terms of tampering with a
6 witness. What he was doing was exploiting the witness's confusion. Rather than
7 dealing with any specific issues of testimony, he was exploiting the witness's
8 confusion to cast counsel in a dim light and deprive Mr. Monschke or diminish
9 our effectiveness as counsel.

10 It was an improper examination, to deprive Mr. Monschke of his right to
11 effective assistance of counsel. We would ask the court to declare a mistrial.

12 ECF No. 26, Exh. 3, at 1258. The trial court denied the motion. *Id.* The prosecutor did not
13 specifically refer to any of Hawkins' inconsistencies in closing argument nor did he suggest
14 any misconduct on defense counsel's part in closing.

15 The Washington Court of Appeals adjudicated this claim on the merits and rejected Mr.
16 Monschke's claim of prosecutorial misconduct:

17 Monschke did not timely object to the prosecutor's questioning. Instead
18 his counsel waited until the State had completed its direct examination of
19 Hawkins and then moved for a mistrial after the lunch recess. *See State v. Gallo*,
20 20 Wn. App. 717, 728, 582 P.2d 558 ("An objection which comes after the
21 witness has answered is not timely unless there was no opportunity to object or it
22 was not apparent from the question that the answer would be inadmissible."),
23 *review denied*, 91 Wn.2d 1008 (1978). In addition, although the record does not
24 reflect that the defense team acted improperly during the interview with Hawkins,
25 in light of Hawkins's inconsistent testimony and his prior statement that he felt
26 pressured to change his story, it was arguably appropriate to clarify Hawkins's
testimony and explore the basis for his prior inconsistent statements. *See* ER 607
(either party may test the credibility of a witness); *State v. Russell*, 125 Wn.2d 24,
92-93, 882 P.2d 747 (1994) (defense counsel's conduct may be questioned if
there is specific evidence in the record to support such an allegation), *cert. denied*,
514 U.S. 1129 (1995); *accord United States v. Patterson*, 23 F.3d 1239, 1248 (7th
Cir.) (where witness' story changes after meeting with defense counsel, "[t]he
prosecutor need not ignore the circumstances and evidence surrounding the prior
inconsistent statements"), *cert. denied*, 513 U.S. 1007 (1994).

1 ECF No. 26, Exh. 23, at 34.

2 The Seventh Circuit case referred to by the Washington Court of Appeals in its decision
3 involved a situation similar to the one at issue here. In that case a witness changed his
4 testimony after a meeting with defense counsel. *U.S. v. Patterson*, 23 F.3d 1239 (7th Cir.
5 1994). The opinion is instructive on the fine line between permissible advocacy and improper
6 imputation of unethical behavior:
7

8 We agree with the Ninth Circuit that it is improper to “state that defense
9 counsel, in general, act[ed] in underhanded and unethical ways, and absent any
10 specific evidence in the record, no particular defense counsel may be maligned.”
11 *Bruno v. Rushen*, 721 F.2d 1193, 1195 (9th Cir. 1983), *cert. denied*, 469 U.S. 920,
12 105 S.Ct. 302 (1984). The defense counsel has a right to interview witnesses and
13 the charge that the mere fact that such an interview takes place suggests that the
14 defense counsel acted unethically is not justified. We find that the prosecutor’s
15 comments do not cross the very fine line between permissible advocacy, and
16 improper imputation of unethical behavior. The prosecutor was commenting on
17 facts that were in evidence, namely that the witness’ story had changed in a short
18 period of time and that he had met with defense counsel. The prosecutor need not
19 ignore the circumstances and evidence surrounding the prior inconsistent
20 statements. The jury is entitled to draw its own conclusions from all of the
21 evidence. Although the defendant argues that the prosecutor’s comments were
22 tantamount to her insinuating that the defense counsel acted improperly, we do
23 not agree. The comments, which were tied very closely to the evidence, were
24 within the realm of permissible advocacy.

18 *U.S. v. Patterson*, 23 F.3d 1239, 1248 (7th Cir. 1994).

19 As in *Patterson*, the prosecutor here was commenting on facts that were in evidence,
20 namely that Hawkins’ testimony was inconsistent, that Hawkins had met with defense counsel,
21 and that Hawkins had told the prosecutor that he had felt some pressure to change his story.
22 Under these circumstances, the prosecutor had a good faith basis to test Hawkins’ credibility
23 and explore the basis for his prior inconsistent statement. As in *Patterson*, the jury was entitled
24 to draw its own conclusions from all of the evidence.
25
26

1 The Washington Court of Appeals' adjudication of this claim was neither contrary to,
2 nor an unreasonable application of, clearly established Supreme Court precedent governing due
3 process claims premised on prosecutorial conduct at trial. Therefore, the undersigned
4 recommends that Claim 6 be denied.

5 **G. Claim 7 – Jury Instructions – Elements of Crime and State's Burden**

6 In his seventh ground for habeas relief Mr. Monschke argues that Instruction No. 12
7 (the "to-convict" instruction) relieved the State of its burden of proving every element of the
8 offense of first-degree murder beyond a reasonable doubt. ECF No. 1, at 33-34; ECF No. 30,
9 at 47-53.

11 "[N]ot every ambiguity, inconsistency, or deficiency in a jury instruction rises to the
12 level of a due process violation. The question is 'whether the ailing instruction ... so infected
13 the entire trial that the resulting conviction violates due process.'" *Middleton v. McNeil*, 541
14 U.S. 433, 437, 124 S.Ct. 1830 (2004). A jury instruction may not be viewed in artificial
15 isolation but must be considered in the context of the instructions as a whole and the entire trial
16 record. *Middleton, supra*; *Estelle v. McGuire*, 502 U.S. 62, 72, 112 S.Ct. 475 (1991); *Boyde v.*
17 *California*, 494 U.S. 370, 378, 110 S.Ct. 1190 (1990); *Cupp v. Naughten*, 414 U.S. 141, 146-
18 47, 94 S.Ct. 396 (1973). It is not enough that a challenged instruction is "undesirable,
19 erroneous, or even 'universally condemned'." *Cupp v. Naughten*, 414 U.S. at 146. The
20 reviewing court must determine "'whether there is a reasonable likelihood that the jury has
21 applied that challenged instruction in a way' that violates the Constitution." *Middleton, supra*
22 (quoting *Estelle v. McGuire, supra*). The "reasonable likelihood" standard from *Boyde* is the
23 settled, single standard of review for jury instructions. See *Estelle v. McGuire*, 502 U.S. at 72
24
25
26

n.4 (discussing and disapproving other standards that considered “how reasonable jurors could have” or “a reasonable juror would have” understood an instruction).

The context in which the instruction must be considered includes the charge as a whole, the evidence presented to the jury, and the arguments of counsel. *Boyde*, 494 U.S. at 383-86; *Jeffries v. Blodgett*, 5 F.3d 1180, 1195-96 (9th Cir. 1993), *cert. denied*, 510 U.S. 1191 (1994). Even if the court finds a constitutional violation under the *Boyde* analysis, however, federal habeas relief may not be granted unless the court also finds that the error, “in the whole context of the particular case, had a substantial and injurious effect or influence on the jury’s verdict.” *Calderon v. Coleman*, 525 U.S. 141, 147, 119 S.Ct. 500 (1998).

Moreover, federal habeas relief is unavailable for perceived errors of state law, such as whether a jury instruction complies with state law. It is not the province of federal courts to reexamine state court conclusions regarding matters of state law. *Estelle v. McGuire*, 502 U.S. at 67-68, 71-72; *Gilmore v. Taylor*, 508 U.S. 333, 341-42, 113 S.Ct. 2112 (1993). Federal habeas review is limited to deciding whether the petitioner is in custody in violation of the Constitution, laws, or treaties of the United States. 28 U.S.C. § 2254(a). State courts are the ultimate expositors of a state’s criminal law, including such matters as the definition of crimes and affirmative defenses, and their construction is binding on the federal courts. *McMillan v. Pennsylvania*, 477 U.S. 79, 85-87, 106 S.Ct. 2411 (1986). On habeas review, an “especially heavy” burden is placed on a petitioner who seeks to show constitutional error from a jury instruction used at his trial that parrots the language of a state statute. *Waddington v. Sarausad*, 555 U.S. 179, 190-91, 129 S.Ct. 823 (2009). “[A] state court’s interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a

1 federal court sitting in habeas corpus.” *Bradshaw v. Richey*, 546 U.S. 74, 76, 126 S.Ct. 602
2 (2005).

3 The Washington Court of Appeals reviewed the instructions and concluded that they
4 complied with Washington law on the crime of first-degree murder and accomplice liability.
5 The trial court instructed the jury on the requirements of accomplice liability under RCW
6 9A.08.020 in Instruction No. 10, as well as the elements of first-degree murder under RCW
7 9A.32.030(1)(a) in Instruction No. 12, the “to-convict” instruction.³ Instruction No. 10
8 read as follows:
9

10 A person is guilty of a crime if it is committed by the conduct of another
11 person for which he is legally accountable. A person is legally accountable for
12 the conduct of another person when he is an accomplice of such other person in
the commission of the crime.

13 A person who is an accomplice in the commission of a crime is guilty of
14 that crime whether present at the scene or not.

15 A person is an accomplice in the commission of the crime of murder if,
16 with knowledge that it will promote or facilitate the commission of the crime of
murder, he or she either:

17 (1) solicits, commands, encourages, or requests another person to commit
18 the murder; or

19 (2) aids or agrees to aid another person in planning or committing the
20 murder.

21 The word “aid” means all assistance whether given by words, acts,
22 encouragement, support, or presence. A person who is present at the scene and
23 ready to assist by his or her presence is aiding in the commission of the crime.
However, more than a mere presence and knowledge of the criminal activity of
another must be shown to establish that a person present is an accomplice.

24 ECF No. 26, Exh. 21, App. D (Instruction No. 10).

25
26 ³ The trial court’s instructions to the jury are all contained in Appendix D to Exhibit 21, the State’s brief on direct appeal.

1 Instruction No. 12 read as follows:

2 To convict the defendant of the crime of murder in the first degree, each of
3 the following elements of the crime must be proved beyond a reasonable doubt:

4 (1) That on or about the 23rd day of March, 2003, the defendant or a
5 person to whom defendant was acting as an accomplice beat Randall Townsend;

6 (2) That the defendant or a person to whom defendant was acting as an
7 accomplice acted with the intent to cause the death of Randall Townsend;

8 (3) That the intent to cause the death was premeditated;

9 (4) That Randall Townsend died as a result of defendant's or an
10 accomplice's acts; and

11 (5) That the acts occurred in the State of Washington.

12 If you find from the evidence that each of these elements has been proved
13 beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

14 On the other hand, if, after weighing all of the evidence, you have a
15 reasonable doubt as to any one of these elements, then it will be your duty to
16 return a verdict of not guilty.

17 ECF No. 26, Exh. 21, App. D (Instruction No. 12).

18 The "to-convict" instruction, considered in conjunction with the accomplice liability
19 instruction, was a correct statement of Washington law. Washington's accomplice liability law
20 requires only a mens rea of knowledge and an actus reus of soliciting, commanding,
21 encouraging, or requesting the commission of the crime, or aiding or agreeing to aid in the
22 planning or the commission of the crime. *State v. Roberts*, 142 Wn.2d 471, 502, 14 P.3d 713
23 (2000). Thus, under state law a person may be guilty of a substantive offense even if he does
24 not have the same mens rea as that needed for the substantive offense and even though he is not
25 involved in the actus reus for the substantive offense. *Id.* at 510-11. Under Washington law
26 there is no distinction between guilt as a principal and guilt as an accomplice.

1 The Washington state legislature has said that anyone who participates in the
2 commission of a crime is guilty of the crime and should be charged the same as a principal,
3 regardless of the degree or nature of his participation. Whether he holds the gun, holds the
4 victim, keeps a lookout, stands by ready to help the assailant, or aids in some other way, he is a
5 participant. *State v. McDonald*, 138 Wn.2d 680, 688, 981 P.2d 443 (1999) (quoting *State v.*
6 *Carothers*, 84 Wn.2d 256, 264, 525 P.2d 731 (1974)).

7
8 The Washington Court of Appeals rejected Mr. Monschke's claim that Instruction No.
9 12 misstated the requirements of state law. ECF No. 26, Exh. 23, at 35-36.

10 The court's instructions were consistent with the rule that "[a] defendant
11 charged as an accomplice to first degree murder may be convicted on proof that
12 he knew generally he was facilitating a homicide, but need not have known that
13 the principal had the kind of culpability required for any particular degree of
14 murder." *State v. Mullin-Coston*, 115 Wn. App. 679, 692 n. 6, 64 P.3d 40 (2003)
15 (discussing *State v. Roberts*, 142 Wn.2d 471, 512-13, 14 P.3d 713 (2000)), *aff'd*,
16 152 Wn.2d 107 (2004). The trial court properly instructed the jury on the
17 elements of first degree premeditated murder and accomplice liability.
18 Monschke's challenge to the instructions is without merit.

19 *Id.* at 35-36.⁴

20 The conclusion of the Washington Court of Appeals that Instruction No. 12 constituted
21 a correct and unambiguous statement of Washington law is binding on federal habeas review.
22 *Bradshaw v. Richey*, 546 U.S. 74, 76 (2005). There was no due process violation. The state
23 court's rejection of Mr. Monschke's jury instruction claim was neither contrary to, nor an
24 unreasonable application of clearly established federal law for purposes of 28 U.S.C. §

25 ⁴ Respondent points out that the prosecutor argued this point at some length in closing argument, without any
26 objection from the defense. *See, e.g.*, ECF No. 26, Exh. 15 at 3060-62. The Washington Court of Appeals on direct
appeal also rejected Mr. Monschke's separate claim challenging the legal correctness of the prosecutor's argument
concerning the requirements of accomplice liability. *Id.*, Exh. 23 at 36-37.

2254(d)(1). This Court’s inquiry ends there. *Waddington v. Sarausad*, 555 U.S. at 192. The undersigned recommends that Claim 7 be denied.

H. Claim 8 – Ineffective Assistance of Counsel

In his eighth ground for federal habeas relief, Mr. Monschke claims that his defense attorneys provided ineffective assistance of counsel in violation of the Sixth Amendment when they failed to adequately prepare Dr. Randy Blazak, the defense expert on white supremacist organizations, to testify during trial. He argues that parts of Dr. Blazak’s testimony on cross-examination damaged his defense. ECF. No. 1, at 35; ECF No. 30, at 54-61.

1. Legal Standard

The primary question when reviewing a claim of ineffective assistance of counsel is not whether counsel provided ineffective representation or whether the state court erred in its analysis of the claim. *Schriro v. Landrigan*, 550 U.S. 465, 127 S.Ct. 1933, 1939 (2007). The primary issue is whether the state court adjudication was unreasonable. *Landrigan*, 127 S. Ct. at 1939; *Bell v. Cone*, 535 U.S. 685, 699, 122 S.Ct. 1843 (2002). The Court owes a great level of deference to the state court adjudication. *Yarborough v. Gentry*, 540 U.S. 1, 5-6, 124 S.Ct. 1 (2003). Because counsel has wide latitude in deciding how best to represent a client, review of counsel’s representation is highly deferential. *Id.* Review is “doubly deferential when it is conducted through the lens of federal habeas.” *Id.* at 6.

To show ineffective assistance of counsel, a petitioner must satisfy a two-part standard. First, the petitioner must show counsel’s performance was so deficient that it “fell below an objective standard of reasonableness.” *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052 (1984). Second, the petitioner must show the deficient performance prejudiced the defense so “as to deprive the defendant of a fair trial, a trial whose result is unreasonable.” *Id.* The

1 petitioner must satisfy both prongs to prove his claim of ineffective assistance of counsel. *Id.* at
2 697.

3 Under the first prong, the petitioner must specifically show “counsel made errors so
4 serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth
5 Amendment.” *Strickland*, 466 U.S. at 687. “There are countless ways to provide effective
6 assistance in any given case. Even the best criminal defense attorneys would not defend a
7 particular client in the same way.” *Id.* at 689. Imposing a detailed set of rules “would interfere
8 with the constitutionally protected independence of counsel and restrict the wide latitude counsel
9 must have in making tactical decisions.” *Id.* The Supreme Court has not articulated specific
10 guidelines for appropriate attorney conduct. *Wiggins v. Smith*, 539 U.S. 510, 521, 123 S.Ct.
11 2527 (2003). Consequently, the proper measure remains reasonableness under prevailing
12 professional norms. *Id.*

13
14 “Judicial scrutiny of counsel’s performance must be highly deferential.” *Strickland*, 466
15 U.S. at 689. “[I]t is all too easy for a court, examining counsel’s defense after it has proved
16 unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.” *Id.*
17 Every effort must be made to “eliminate the distorting effects of hindsight,” and to judge
18 counsel’s performance from counsel’s perspective at the time of trial. *Id.* “Because of the
19 difficulties inherent in making the evaluation, a court must indulge a strong presumption that
20 counsel’s conduct falls within the wide range of reasonable professional assistance....” *Id.*
21 “[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant
22 decisions in the exercise of reasonable professional judgment.” *Id.* at 690. The Court always
23 applies this presumption of competence. *Id.* at 689.
24
25
26

1 Under the second prong, that the petitioner must prove prejudice from counsel's allegedly
2 deficient representation. *Cullen v. Pinholster*, --- U.S. ---, 131 S.Ct. 1388, 1403 (2011). It is not
3 enough that counsel's errors had "some conceivable effect on the outcome." *Strickland*, 466
4 U.S. at 693. Rather, the petitioner must show "that, but for counsel's unprofessional errors, the
5 result would have been different." *Id.* at 694. The petitioner "must show that there is a
6 reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings
7 would have been different." *Id.* "That requires a 'substantial,' not just 'conceivable,' likelihood
8 of a different result." *Pinholster*, 131 S.Ct. at 1403 (quoting *Harrington v. Richter*, --- U.S. ---,
9 131 S. Ct. 770, 791 (2011)).

11 **2. Dr. Blazak's Testimony**

12 RCW 10.95.020(6) provides that a first-degree murder is an aggravated first-degree
13 murder if the defendant "committed the murder to obtain or maintain his or her membership or
14 to advance his or her position in the hierarchy of an organization, association, or identifiable
15 group." The State alleged that the relevant group in Mr. Monschke's case was white
16 supremacists and called Dr. Mark Pitcavage as an expert witness to support its theory. Defense
17 counsel chose to call Dr. Randy Blazak to explain that white supremacists are not an
18 identifiable group and that "Volksfront," the specific white supremacist organization to which
19 Mr. Monschke belonged, was a nonviolent group.

21 Dr. Blazak was a tenured professor of sociology at Portland State University who had
22 done extensive research in several American and European cities into skinhead hate
23 organizations. ECF No. 26, Exh. 14, at 2885-86. Dr. Blazak was also the head of the Hate
24 Crime Research Network at Portland State, a network of researchers and academics who study
25 hate crimes. He was also the chairperson of the Oregon Coalition Against Hate Crimes, a
26

1 group made up of law enforcement personnel, civil rights groups, and other members of the
2 public. *Id.* at 2886-88. In that capacity he had several interactions with Randall Krager, the
3 founder and leader of the Portland-based Volksfront, and monitored some of Volksfront's
4 activities. *Id.* at 2904-09, 2912.

5 Dr. Blazak testified on direct examination that "white supremacists" did not constitute
6 an "identifiable group" because there was too much disagreement among the several different
7 factions. *Id.* at 2891-2903. The two core principles that tie together all the different white
8 supremacist groups are a general belief that whites are superior to members of other races and
9 that the white race is currently under threat, but beyond that the groups are in great
10 disagreement, even over such basic things as defining who is a "white" person. *Id.* There is no
11 single umbrella organization or hierarchy within the white supremacy community. *Id.* at 2921.
12 Dr. Blazak's opinion was that "white supremacy" did not constitute an identifiable group with
13 a single, comprehensive ideology but rather was "a counterculture held together, barely, by this
14 idea of racism and white supremacy . . . [I]t's part of a continuum. So many of the beliefs are
15 popular in mainstream society about race and homosexuality, for example, very popular in
16 mainstream society. Those views aren't just the domain of white supremacists." *Id.* at 2922.
17 Although Volksfront began as a prison-based skinhead group, the organization underwent
18 several changes in 2001 and now promotes itself publicly as a nonviolent, European heritage
19 organization. *Id.* at 2907-09. After the murder of Randall Townsend, Mr. Monschke's
20 membership was revoked and Volksfront issued a statement distancing itself from Mr.
21 Monschke and condemning his actions. *Id.* at 2914.

22 On cross-examination, Dr. Blazak agreed that, using the common definition of the word
23 "group," white supremacists could be broadly defined as a "group" adhering to a common
24

1 ideology: that white people are superior and the white race is threatened. *Id.* at 2923-25. He
2 also confirmed that Volksfront is a very secretive organization and conceded it was possible
3 that the nonviolent message Volksfront publicly espouses is not necessarily genuine. *Id.* at
4 2929-30. “[T]here is a public face, and then there may be this world that even I haven’t seen.”
5 *Id.* He agreed the group may have distanced itself from Mr. Monschke solely to avoid liability
6 from civil lawsuits. *Id.*

7
8 In his personal restraint petition filed with the Washington Court of Appeals, Mr.
9 Monschke argued that his defense counsel had rendered ineffective assistance of counsel by
10 failing to adequately interview and prepare Dr. Blazak prior to his testimony. In support of his
11 claim, Mr. Monschke submitted a declaration from Dr. Blazak and one of his former defense
12 counsel, Erik Bauer (not from Jay Berneburg, the attorney who actually conducted the direct
13 examination of Dr. Blazak). ECF No. 26, Exh. 27, attached Declaration of Eric Bauer; Exh.
14 30, App. B (Declaration of Dr. Randy Blazak). The Court of Appeals reviewed the new
15 evidence in light of the trial record and concluded that Mr. Monschke had failed to demonstrate
16 that counsel’s performance was deficient:

17
18 Monschke’s trial attorneys made a strategic and tactical decision to call an
19 expert witness to explain that white supremacists are not an identifiable group and
20 that Volksfront was a nonviolent white supremacist group. Thus, Monschke’s
21 attorneys planned to “negate[] the prosecution’s efforts to establish Mr.
22 Monschke’s membership and advancement as required by the [aggravating
23 circumstance] statute.” PRP Decl. of Eric L. Bauer (Dec. of Bauer) at 2-3. But,
24 according to defense counsel, at trial, Blazak “presented opinions that he had not
25 presented in pretrial interviews” and he “volunteered [the damaging information]
26 without being prompted.” Dec. of Bauer at 3. Even though this unexpected
testimony allegedly “damaged the defense on every critical point,” Monschke’s
counsel’s performance does not rise to the level of ineffective assistance of
counsel. Dec. of Bauer at 3.

...

1 Bauer declares that Blazak volunteered information without prompting by
2 questions during his testimony. In any attorney's experience, this behavior by a
3 witness is problematic, making the person a difficult witness. But Monschke
4 points to nothing that would have ensured that Blazak did not volunteer
5 information on the stand, even if his counsel had done a mock trial or practiced
6 Blazak's testimony, since Blazak volunteered his testimony without prompting,
7 and Blazak declared he testified to nothing inconsistent with what he told
8 Monschke's defense counsel before trial.

9 Monschke does not argue that defense counsel is held to a higher standard
10 in preparing for an expert witness than the standard applicable to an alibi witness
11 or any other indispensable witness. The record does not disclose the details of
12 Monschke's trial counsel's pretrial interviews with Blazak, but we do know that
13 they met with him more than once. From the record before us, Monschke's trial
14 counsel's preparation of Blazak did not fall below the standard discussed in [*In re*
15 *Stenson*, 142 Wn.2d 710, 16 P.3d 1 (2001)] or [*In re Pirtle*, 136 Wn.2d 467, 965
16 P.2d 593 (1998)]. Therefore, we hold that, because Monschke's counsel made a
17 strategic tactical decision to call an expert to rebut the State's expert testimony,
18 met with Blazak before trial, and then Blazak volunteered information from the
19 witness stand, Monschke has not met his burden of establishing that trial
20 counsel's performance was deficient based on inadequate expert witness
21 preparation.

22 ECF No. 26, Exh. 31, at 13-14.

23 The Court of Appeals further ruled that Mr. Monschke had failed to demonstrate that
24 Dr. Blazak's unexpected testimony prejudiced the defense, in light of the other evidence
25 admitted at trial through such witnesses as Dr. Pitcavage, Tristain Frye, and Mr. Monschke
26 himself:

 First, Blazak provided both expected testimony that helped the defense as
well as unexpected, damaging testimony. Throughout his testimony, Blazak
remained consistent in putting forth his views that supported Monschke's position
that "white supremac[ists]" were not an "identifiable group" because there is too
much disagreement among the people who share the white supremacist ideology.
34 RP at 2891. Blazak also testified that Volksfront has a hierarchy in which
members "gain status ... through hard work and dedication." 34 RP at 2920.

 Additionally, he explained how a person might obtain notoriety among
people who are white supremacists by murdering someone inferior, but he
maintained that white supremac[ists] do not have a formal hierarchy or status
structure. Blazak further testified that Volksfront may secretly promote violence,

1 but he also stated that, “having monitored [Volksfront,] we couldn’t come up with
2 any incidents of anybody who has been promoted because of any act of violence.”
3 34 RP at 2914. Blazak also testified that Volksfront e-mailed Blazak, saying that
4 they “condemn acts of violence and [Monschke’s] membership ... had been
5 terminated,” that “the movement of Volksfront is to say these violent offenders
6 are hurting [their] larger cause,” that “newer members of the Volksfront are less
7 violent,” and that he believes Randall Craiger, the leader of Volksfront, “is
8 sincere in his desire to take Volksfront into this new [nonviolent] territory of
9 white supremacy.” 34 RP at 2914, 2964, 2970, 2972.

10 It is unclear whether Monschke is arguing that his trial attorneys should
11 have called another expert or no expert at all. But even without Blazak’s
12 testimony, there was sufficient evidence for a reasonable jury to have found the
13 aggravating circumstance based on other trial testimony. For example, the State’s
14 expert witness testified that many white supremacist groups internally advocate
15 violence but publicly profess nonviolence to avoid civil liability. *Monschke*, 133
16 Wn. App. at 327. Thus, the State had already offered testimony similar to
17 Blazak’s. Additionally, Monschke admitted his involvement in Volksfront.
18 Frye’s testimony about going out with Monschke, Butters, and Pillatos to earn her
19 red shoelaces, which would mean increased notoriety among white supremacists,
20 also supports the aggravating circumstance.

21 Because we hold that Monschke’s counsel was not deficient and did not
22 prejudice Monshke’s right to a fair trial, his ineffective assistance of counsel
23 claim fails.

24 ECF No. 26, Exh. 31, at 14-16.

25 In his ruling denying Mr. Monschke’s motion for discretionary review, the
26 Commissioner of the Washington Supreme Court similarly concluded that Mr. Monschke had
failed to meet his burden under *Strickland*:

Calling Dr. Blazak as a defense witness was a reasonable trial tactic in
light of his expertise on white supremacist groups. The likely alternative would
have been to allow the State to put on its expert witness without opposition.
Whether defense counsel should have spent more time preparing Dr. Blazak for
potential prosecution questions may be debatable in light of events at trial, but
even if counsel was deficient in this regard, Mr. Monschke fails to show
prejudice; that is, a reasonable probability that, but for the alleged deficiency, the
result would have been different. *See In re Pers. Restraint of Davis*, 152 Wn.2d
647, 672-73, 101 P.3d 1 (2004). Even without Dr. Blazak’s testimony, the jury
likely would have found the aggravating factor based other evidence on the
testimony of the State’s expert; Mr. Monschke’s admission of membership in

Volksfront; and the testimony of Tristain Frye (another participant in the murder who pleaded guilty to second degree murder), who stated that the killing was connected with promotions in the white supremacy hierarchy.

ECF No. 26, Exh. 39, at 2 (footnote omitted).

The Washington state appellate courts correctly noted that calling Dr. Blazak as a defense witness in light of his expertise on white supremacist groups to counter the State's expert witness was a reasonable trial tactic. The alternative would have been to allow the State to put on expert testimony with no rebuttal.

The Washington appellate courts also correctly noted that even without Dr. Blazak's testimony, the jury likely would have found the aggravating factor based other evidence – the jury had already heard from: (1) Mr. Monschke that he was a member of Volksfront; (2) the State's expert that Volksfront had a history of violence and that white supremacists are a finite subset of society who adhere to a common ideology; and (3) Tristain Frye that killing is connected with promotions in the white supremacy hierarchy.

The Washington appellate courts' rulings involved a reasonable application of the *Strickland* standard and the undersigned recommends that Claim 8 should be denied.

I. Claim 9 – Prosecutorial Misconduct – Using Frye as a State Witness

In his ninth ground for federal habeas relief, Mr. Monschke alleges the prosecutor committed misconduct by encouraging Tristain Frye to commit perjury as a State's witness. Monschke contends that even though Frye equally participated in the crime, she was allowed to plead guilty to second-degree murder, rather than first-degree murder. He claims the prosecutors knew that Frye and David Pillatos were fabricating a story in order to exonerate and to create a defense for Pillatos, with the goal of getting plea bargains in exchange for their testimony. Mr. Monschke further contends that Frye was offered the favorable plea agreement

1 she ultimately received only because the elected prosecutor at that time, Gerald Horne, was a
2 close personal friend of Frye's defense attorney. ECF No. 26, at 37-40; ECF No. 30, at 62-72.

3 The knowing presentation of false testimony or evidence against a defendant to obtain a
4 conviction may constitute a violation of due process. *Giglio v. United States*, 405 U.S. 150,
5 153-54, 92 S.Ct. 763 (1972); *Napue v. Illinois*, 360 U.S. 264, 269, 79 S.Ct. 1173 (1959). To
6 prevail on a *Napue* claim, the petitioner must show "(1) the testimony (or evidence) was
7 actually false, (2) the prosecution knew or should have known that the testimony [or evidence]
8 was actually false, and (3) the false testimony [or evidence] was material." *Hein v. Sullivan*,
9 601 F.3d 897, 908 (9th Cir. 2010) (quoting *United States v. Zuno-Arce*, 339 F.3d 886, 889 (9th
10 Cir. 2003)). False evidence is "material" under the *Napue* standard if there is any reasonable
11 likelihood that the false evidence could have affected the judgment of the jury. *United States v.*
12 *Bagley*, 473 U.S. 667, 678, 105 S.Ct. 3375 (1985) (quoting *United States v. Agurs*, 427 U.S.
13 97, 103, 96 S.Ct. 2392 (1976)).
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16 Tristain Frye testified as a State's witness at Mr. Monschke's trial. ECF No. 26, Exh.
17 10, at 2326-49; Exh. 31, at 2356-2496. She pled guilty, pursuant to a plea agreement, to
18 murder in the second degree for her role in the death of Randall Townsend. *Id.*, Exh. 10, at
19 2327.⁵ Mr. Monschke raised a claim in his personal restraint petition challenging the
20 prosecutor's plea agreement with Frye. In support of that claim he submitted a declaration
21 dated September 30, 2008, from a former Pierce County deputy prosecuting attorney who had
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24 ⁵ Copies of Frye's written guilty plea statement and her plea agreement in *State v. Frye*, Pierce County Superior
25 Court No. 03-1-01463-1, were provided to Mr. Monschke's defense counsel and are contained in the appendices to
26 the State's response to Mr. Monschke's personal restraint petition. ECF No. 26, Exh. 28A, App. D (*State v. Frye*,
Statement of Defendant on Plea of Guilty), and *id.* at App. E (*State v. Frye*, Plea Agreement). Frye received a 165-
month prison sentence, which represents the low end of the standard sentencing range for second-degree murder.
ECF No. 26, Exh. 28A, App. Q (*State v. Frye*, Judgment and Sentence).

1 been involved the case before Frye, Butters, and Pillatos entered into their plea agreements.
2 *Id.*, Exh. 27, attached Declaration of Barbara Corey.

3 Ms. Corey opined that (1) Frye and Pillatos were fabricating a story and attempting to
4 perpetrate a fraud on the court and the prosecutor's office, (2) Pillatos and Frye's versions of
5 events were suspect in light of their correspondence with each other, (3) Prosecutor Horne and
6 the two deputy prosecutors who tried the case knew of Frye and Pillatos's plan to manipulate
7 the trial, (4) she was personally opposed to giving Frye a reduced sentence, and (5) Frye
8 received her favorable plea agreement because of a personal relationship between Horne and
9 Frye's attorney. *Id.*

11 The State responded to Mr. Monschke's claim and submitted the affidavits of the two
12 deputy prosecutors who executed the plea agreement with Frye. ECF No. 26, Exh. 28A
13 (Appendices to State's Response), at App. M (Affidavit of Greg Greer), and *id.* at App. O
14 (Affidavit of Gerald Costello). The prosecutors stated Ms. Corey had a great deal of animosity
15 for Frye's defense counsel and her animosity affected her judgment regarding an assessment of
16 Frye's culpability. The deputy prosecutors decided to enter into a plea agreement with Frye
17 because she was the most credible and least culpable of the four co-defendants and she was the
18 only one who expressed any remorse for the murder. Although she and Pillatos had
19 corresponded with each other from jail (which correspondence was intercepted by jail
20 officials), Frye had not attempted in any of her letters to manipulate Pillatos's testimony. "Ms.
21 Frye's correspondence to Mr. Pillatos did not contain attempts to influence his testimony. Ms.
22 Frye's correspondence indicated that she intended to tell the truth about what happened that
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1 night.” *Id.*, App. M at 6-7.⁶ The deputy prosecutors also asserted that Prosecutor Horne had
2 no role in the decision-making process with regard to Frye’s plea agreement, and Horne’s
3 friendship with Frye’s attorney was not a factor in the decision to offer Frye a plea agreement.
4 *Id.*, App. M at 8; App. O at 2.

5 The Washington Court of Appeals concluded the prosecutors had shown a legitimate
6 purpose in offering a plea agreement to Frye and dismissed Mr. Monschke’s allegation that the
7 prosecutors’ entering into a plea agreement with Frye was improper. ECF No. 26, Exh. 31, at
8 17-18.
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10 Here, Monschke, Frye, Butters, and Pillatos all testified at Monschke’s
11 trial. And although their testimony differed about the sequence of events the
12 night of the murder and Monschke’s participation in the assault on Townsend, the
13 defense had the opportunity to cross-examine and impeach all of Monschke’s
14 codefendants, particularly Frye and Pillatos, using the known content of their
15 communications before they entered their pleas and before they testified. On
16 cross-examination, Monschke’s counsel confronted Frye about only one letter she
17 had written from jail, and it was one she had written to Monschke, not Pillatos.

18 Our review of other jail correspondence Frye wrote shows that, although
19 she wanted direction from Pillatos, she also demonstrated remorse and repeatedly
20 discussed her intention to tell the truth and her desire for Pillatos to support her
21 decision to testify truthfully. It is likely that if the defense had attempted to
22 impeach Frye with the letters she wrote Pillatos or others that the State would
23 have responded by introducing the numerous letters wherein she wrote about
24 telling the truth and wanting to take a polygraph examination. Therefore, defense
25 counsel likely made the tactical decision not to attempt to impeach Frye based on
26 her communication with Pillatos because they knew the attempt would be
unsuccessful and might open the door to evidence that would bolster her
credibility with the jury.

Furthermore, Monschke has not demonstrated that Frye committed
perjury, as he failed to identify what portion of Frye’s testimony constituted

⁶ All of Frye’s intercepted jailhouse correspondence - consisting of several hundred pages of letters - was turned over to Mr. Monschke’s defense counsel as part of the pretrial discovery process. ECF No. 26, Exh. 28A, App. P (Affidavit of Michelle Prichard); App. R (Affidavit of Kathleen Proctor, describing and categorizing Frye’s correspondence); and App. S (Frye correspondence). Neither Mr. Monschke nor his defense counsel ever disputed that the defense was in possession of all of Frye’s letters.

1 perjury. He points only to the prosecutors' knowledge that Pillatos and Frye
2 communicated about assisting each other, which knowledge the prosecutors
3 shared with the court and defense when they discovered these communications,
making all aware of their violation of the court's order. Monschke's prosecutorial
misconduct claims fail.

4 ECF No. 26, Exh. 31, at 18-20 (footnote omitted). The Commissioner of the Washington
5 Supreme Court concurred with the Court of Appeals' determination:

6 [Monschke's] assertions are speculative. I agree with the Court of Appeals that
7 the State did not knowingly put on perjured testimony and that there is
8 insufficient evidence that Ms. Frye perjured herself. Mr. Monschke thus fails to
show either improper conduct or prejudice arising from misconduct.

9 ECF No. 26, Exh. 39, at 3 (citation omitted).

10 As noted by the Washington Court of Appeals, Mr. Monschke was given pretrial access
11 to several hundred pages of letters between Frye and Pillatos. The defense also had ample
12 opportunity to thoroughly cross-examine Frye concerning her plea agreement, her relationship
13 and correspondence with Pillatos, and any other matters bearing on her potential bias. It was
14 up to the jury to decide whether she was credible.

15 The Washington appellate courts' adjudication of Mr. Monschke's claim was neither
16 contrary to, nor an unreasonable application of clearly established federal law for purposes of
17 28 U.S.C. § 2254(d). Therefore, the undersigned recommends that Claim 9 be denied.

18 **CERTIFICATE OF APPEALABILITY**

19 A petitioner seeking post-conviction relief under 28 U.S.C. § 2254 may appeal a district
20 court's dismissal of his federal habeas petition only after obtaining a certificate of appealability
21 from a district or circuit judge. A certificate of appealability may issue only where a petitioner
22 has made "a substantial showing of the denial of a constitutional right." *See* 28 U.S.C. §
23 2253(c)(3). A petitioner satisfies this standard "by demonstrating that jurists of reason could
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1 disagree with the district court's resolution of his constitutional claims or that jurists could
2 conclude the issues presented are adequate to deserve encouragement to proceed further.”
3 *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). Under this standard and based on a thorough
4 review of the record and analysis of the law in this case, this Court concludes that Mr. Monschke
5 is not entitled to a certificate of appealability with respect to this petition.
6

7 **CONCLUSION**

8 Based on the foregoing discussion, the undersigned recommends that Mr. Monschke's
9 habeas petition be **denied**. Pursuant to 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b), the
10 parties shall have fourteen (14) days from service of this Report and Recommendation to file
11 written objections. See also Fed. R. Civ. P. 6. Failure to file objections will result in a waiver
12 of those objections for purposes of appeal. *Thomas v. Arn*, 474 U.S. 140 (1985).
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14 Accommodating the time limit imposed by Rule 72(b), the Clerk is directed to set the
15 matter for consideration on **June 29, 2012**, as noted in the caption.
16

17 **DATED** this 11th day of May, 2012.

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20 Karen L. Strombom
21 United States Magistrate Judge
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